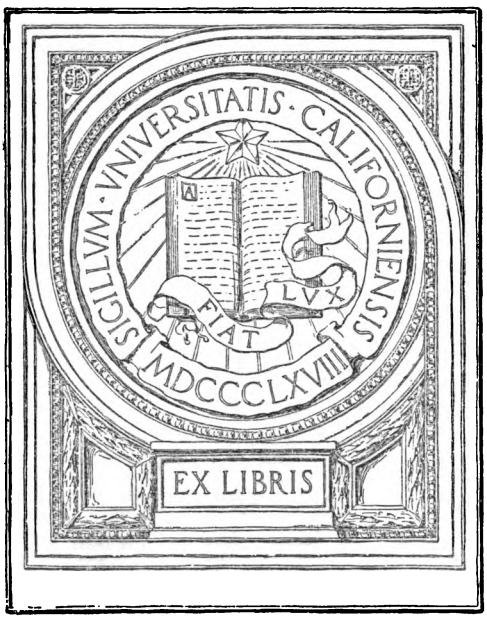

MONTGOMERY COUNTY

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REPORTS OF CASES

DECIDED BY

THE COURTS OF MONTGOMERY COUNTY.

FOR THE YEAR 1904.

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REPORTED BY F. G. HOBSON
OF THE MONTGOMERY COUNTY BAR.

NORRISTOWN, PA.
1904.

JURISPRUDENCE

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A borough ordinance imposed a tax on electric light poles, and subsequently entered into an agreement with the company to light the streets of the borough for a stipulated sum per light. A number of the poles were used exclusively for this purpose, and the company denied liability for the tax on them. *Held*, that the tax could be collected.

Motion for judgment. No. 60, October T., 1903.

Wm. F. Meyers, Esq., for plaintiff.

Henry M. Tracy, Esq., for defendant.

Opinion of the court by Weand, J., December 7, 1903.

This suit is brought to recover a license fee of fifty cents per pole on one hundred and thirty-eight poles erected and maintained by defendant within the corporate limits of the plaintiff borough.

In 1897 an ordinance of the borough was enacted imposing a license fee of one dollar on each pole, which by ordinance of October 10, 1898, was reduced to fifty cents per pole.

On December 7, 1898, an agreement was entered into between the plaintiff and defendant by which the latter agreed to light the streets of the borough with electric lights for a term of five years at a stipulated sum per light.

Of the one hundred and thirty-eight poles erected ninety-three are used exclusively for the municipal lighting.

The defence to the motion for judgment on the answer is:

1. "That ninety-three poles taxed by the plaintiff were placed on the highways for the exclusive use of the borough under the direction of the street committee, and at their special instance and request, and are not subject to a license fee"; and

2 "That the tax assessed on all the poles and wires of the defendant is unreasonable and unjust, and not based upon any cost of supervision or expense incurred, but is unlawfully assessed for the purpose of revenue; and that the defendants if liable at all, then only to such reasonable amount as may be assessed by the jury from the evidence."

In support of the first position defendants rely upon the case of New Castle vs. Electric Company, 16 C. C., 663. In that case the city of New Castle entered into a contract with an electric light company to furnish light for the city, and some time afterwards passed an ordinance taxing all electric light poles and wires. The court held that "this could not be imposed on any poles or wires used exclusively for the purpose of lighting the city under the contract, but could be imposed on all poles and wires used for furnishing light to private consumers." This ruling was based upon the principle of law (as stated by the court) that "where a party makes a contract to do a certain thing for another, which contract requires the use of that party's property, and the party owning the property having knowledge of what use the contract would require of his property, and with such knowledge signs said contract, he gives his implied consent to the rightful use of such property for the purpose of carrying out said contract."

In the case in hand, however, the ordinance was in effect prior to the contract. The defendant knew, or was assumed to know, that a license fee was required on all poles erected; and the agreement being silent upon the subject, the defendant made its contract subject to the ordinance. It is no defence to say that the borough might impose a tax which would materially lessen the cost of lighting. If such action were taken the court would find a remedy. We must assume that when defendants fixed their charge per light they took into consideration the tax imposed on the poles. The New Castle case differs from this in that here the tax was imposed prior to the contract; there it was imposed afterwards.

The point has been decided adversely to defendant in Kittanning Electric Light, Heat and Power Co. vs. Kittanning Borough,

11 Sup. Ct., 31, where it was said: "This is not tenable ground. There was no attempt made by the parties to the contract against the subsequent imposition of a license fee, and had there been it would have availed nothing. A municipality can not waive or bargain away the right to exercise police powers delegated by the state: McKeesport City vs. Passenger Railway Co, 2 Pa. Superior Court, 242, 249."

In support of the second point defendant relies upon the decision of the United States Supreme Court in the case of the Atlantic and Pacific Telegraph Co. vs. City of Philadelphia, decided June 1, 1903, and reported in Supreme Court Reporter, Vol. 23, page 817.

We think that the full import of this decision has been misconstrued by counsel as applicable to the case in hand, and unless it is binding authority as overruling the decision of our own Supreme Court in New Hope Borough vs. Postal Telegraph Cable Co., 202 Pa., 532, plaintiff is entitled to his judgment. Three things must be borne in mind—that no question of interstate commerce is involved; the poles are erected in a small borough; and the question arises on a motion for judgment for want of a sufficient affidavit of defence. The affidavit sets forth the following defence on this point: "Because said plaintiffs have not exercised any supervision over the poles and wires of said defendant company through its officers by virtue of its police powers, and that the amount of the license fee levied and charged against the defendants in plaintiff's statement claim is unreasonable and unjust and is not based upon the cost of supervision or expense incurred thereby, but that the same is unlawfully levied as a tax for the purpose of revenue only"; and that "plaintiffs have not expended any moneys in police supervision or have not incurred any liability or expense in any manner incident to maintenance of said poles in said borough, save the costs of printing said original ordinance," etc. If the defendant is liable, the question of what is a reasonable amount should be submitted to a jury. All these points are disposed of in New Hope Borough vs. Postal Telegraph Cable Co., *supra*, as follows:

"The adoption by a borough of an ordinance imposing a reasonable annual fee for each pole and each mile of suspended wire erected and maintained by telegraph, telephone and electric light companies within the borough limits, is a valid exercise of police power.

"In an action by a borough against a telegraph company to recover a license fee on poles and wires for a particular year, the same being payable at the beginning of the year, the fact that the borough did not expend money for inspection, supervision or police surveillance of the poles and wires in that year is not a defence.

"The courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged, unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities.

"In an action to recover a license fee imposed upon telegraph companies by a borough, where the facts are not in dispute, the question of the reasonableness of the license fee is for the court."

In Taylor Borough vs. Postal Telegraph Co., 202 Pa., 583, the same principles are affirmed, and the opinion of the Superior Court cited gives the unanswerable reasons therefor.

Referring now to the opinion of the United States court, we find that it is based upon an entirely different state of facts.

The issue was tried before a jury because the affidavit of defence set forth sufficient to raise an issue, and the court could not decide the question as a matter of law. In our case, however, the question arises on the sufficiency of the affidavit, and it is for the court to say whether the facts alleged and not disputed amount to a defence. That they do not is shown by New Hope case, *supra.*

The amount of fee is small and less than has been sustained by our higher courts in several cases. That the borough has been under no expense is immaterial. If they do not exercise supervision, it may be to their loss; but of that defendant's counsel can not complain as a defence to the fee. There is, therefore, nothing for this court to refer to a jury; and we conclude that this is decided by the United States decision, which in effect sustains every position taken by our Supreme and Superior Court, except in cases where there is a disputed question of fact to be submitted to a jury, and that where there is no such disputed fact the court must decide as to the reasonableness of the fee to be charged. A few extracts from the opinion will more fully explain our meaning.

After referring to its own decision in Western Union Telegraph Co. vs. New Hope, 187 U. S., 419, as showing that "a license fee (as this) was not a tax on the property of the company, etc., but was a charge in the enforcement of local governmental supervision,"

and as such lawful, it says: "But it does not follow from this that a municipality is not subject to any restraint in the amount of the charge which it exacts. True, it is often said that a license tax is in its nature arbitrary; that it is not necessarily graduated by the value of the property invested in the business licensed or its profitableness. But such observations are pertinent only in case the license is resorted to for the purpose of revenue. Where it is authorized only in support of police supervision, the expense of such supervision determines the amount of the charge; and if it were possible to prove in advance the exact cost, that would be the limit of the tax. In the nature of things, that, however, is ordinarily impossible, and so the municipality is at liberty to make the charge large enough to cover any reasonable anticipated expenses. It is authorized to fix such charge in advance, and need not wait until the end of the period for which the license is granted. It may not act arbitrarily or unreasonably, but the risk may rightfully be cast on the licensee, and the charge can not be avoided because it subsequently appears that it was somewhat in excess of the actual expense of the supervision, nor can the licensee then recover the difference between the amount of the license and the cost. . . . We pass, therefore, to consider the question of the reasonableness of this license charge. *Prima facie*, it was reasonable: Western Union Telegraph Co. vs. Hope, *supra*. It devolved upon the company to show it was not. The case, as we have seen, was tried before the court and jury. . . . It is urged by the city that inasmuch as the license fees here charged are the same as charged by the borough of New Hope, the validity of which was sustained in Western Union Telegraph Co. vs. New Hope, *supra*, it necessarily follows that the charges here imposed are reasonable. But this is a mistake. What is reasonable in one municipality may be oppressive and unreasonable in another." From this it will be seen that the case was decided on the peculiar facts shown by the defence, and does not overrule Telegraph Co. vs. New Hope, 187 U. S., 419, or New Hope vs. Postal Telegraph Co., 202 Pa., 534.

As the license fee in this case is not so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, it is a question for the court: Chester City vs. Telegraph Co., 154 Pa.,

464; Taylor Borough vs. Telegraph Co., 202 Pa., 583; Western Union Telegraph Co. vs. New Hope, 187 U. S., 419.

And now, December 7, 1903, judgment is directed to be entered in favor of plaintiff and against defendants for the sum of sixty-nine dollars, with interest thereon from January 1, 1903, with costs.

Orphans Court of Montgomery County.

Estate of William Armstrong, Deceased.

A devise of the whole of testator'e estate to his executors in trust for use of his widow during life, and of the rents, issues and profits thereof, followed by the direction that upon her death the executors should equip one of testator's farms with stock and farm utensils for the use of a son during his life, with remainder over to his issue, and in default of issue to the next of kin, is an estate tail to the son, which under the act of April 27, 1855, becomes an estate in fee simple, subject to the life estate of the widow.

The widow and children entered into a family agreement with the consent and approval of the executors, whereby the widow released her life estate in the farm, the executors were authorized to equip it with stock and implements, and the son was given the present right of occupancy. *Held*, that the purpose of the agreement and the intention of the parties was to give the son immediate possession and enjoyment of the farm and its equipment otherwise postponed by the will until after the death of the widow.

An insured building on the farm having been destroyed by fire, and the loss having been paid to the executors, they will be ordered to pay over the same to the son as the owner of the destroyed building.

Petition for order on executors to pay over to devisee amount received by them for fire losses.

E. F. Slough, Esq., for petitioner.

G. R. Fox, Esq., contra.

Opinion of the court by Solly, P. J., December 7, 1903.

The decedent died in Montgomery township, this county. His will was admitted to probate May 28, 1890, and letters testamentary granted to Charles S. Knapp, William Gordon Armstrong, Charles D. Hill and Dr. Moses R. Knapp, the executors therein named. He left surviving a widow, Ann Jane, and issue four children, John G. C. Armstrong, William Gordon Armstrong, Mary Downey and Jane Hill. Among other lands he was seized in fee of three farms, which

he denominated in his will as the "North Wales" farm, the "Home" farm, and the "Conley" farm. He devised and bequeathed all his estate to his executors in trust for the use and benefit of his wife during life, and bequeathed to her the rents, issues and profits thereof. At her death he disposed of the three farms above mentioned by giving the use and occupation of one each to his children, John, William and Mary—that is to say, the "North Wales" farm to John, the "Home" farm to William, and the "Conley" farm to Mary, for the life of each, with remainder over, as to the "North Wales" farm, on the death of John, to his issue, and in default of issue to next of kin; as to the "Home" farm, on the death of William to his issue, and in default of issue to the next of kin; and as to the "Conley" farm, on the death of Mrs. Downey to her son, William Armstrong Downey.

The language of the will devising the "North Wales" farm to John is as follows:

"I further direct that after the death of my wife, the said Ann Jane Armstrong, my executors shall fully equip the North Wales farm with stock and farming utensils for the use and occupancy of my son, John G. C. Armstrong, during his life-time, he, the said John G. C. Armstrong, to receive, have and enjoy all the benefits arising therefrom; and at his death, if he shall have issue the said issue shall receive the benefits, and in case he shall leave no issue the profits and benefits to be divided among the next of kin."

It seems the provisions of the will created discord among the members of the decedent's family, and this occasioned difficulties and annoyances to the executors and interfered with the settlement of the estate. On February 28, 1891, a family agreement was entered into with the consent and approval of the executors, which was signed by the widow and children. After reciting that the will "has caused much difficulty in conducting the business of the estate, and made confusion and perplexity in the affairs of the family," thereby making it important that there should be an immediate ordering of affairs, "to the end that proper immediate provisions be made for the children of said decedent and family harmony promoted," the parties agreed that the three farms should be presently occupied by the three children, instead of the use and enjoyment being postponed until after the death of the widow; that horses, cattle, implements, crops, etc., should be divided; that repairs should be made

to the "North Wales" and "Conley" farms, to be paid for by the estate; that a cash sum should be paid to John; and that a certain mortgage should be assigned to Mrs. Hill.

The household furniture at the "Home" farm was admitted to be the widow's property, and her right to live on the farm at any and all times was to be undisputed. She retained a horse, carriage and set of harness, with room for stabling and housing same. If from any cause William should fail to occupy the "Home" farm personally, then she was to have the right to use and occupy the entire house, lawn, etc., with the privilege of stable and carriage-house. It was also agreed that at the expiration of one year from the date of decedent's death there would be due her $450 out of the moneys of the estate in addition to the moneys she had already received, which sum was to be received and accepted in full payment for all rents, issues and profits of the estate for the first year to which she was entitled under the will.

The provisions of the agreement were fully carried out. The son, John, entered into the occupancy of the "North Wales" farm, and continues to occupy it. The buildings, etc., were insured against loss by fire and storm by a policy issued by the Union Mutual Fire and Storm Insurance Company, of Norristown, for $9,500, and held by the estate. Among other buildings it covered a brick house. This was totally destroyed by fire on March 23, 1903. The loss was adjusted at $1,000. Claim for payment was made by John. The company paid it to the executors. The company is a mutual one, and assessments to pay losses are made from time to time on the members. The assessments levied upon the policy after John occupied the farm were paid by him.

It is over this money that the contention in this case arises. The widow makes no claim to it, or to the interest of it. The son claims the devise of the farm gives him a fee which carries with it the right to the money, as it takes the place of a building upon the farm at the time of the decedent's death. He admits his right of possession of the farm was postponed by the will until after the death of the widow, but says the possession, use and occupation is vested in him by the family agreement, which includes the release by the widow of her life estate therein.

The executors contend that while the agreement gives him a right to the occupation of the farm, it can be terminated by the

widow any time she chooses. They deny that the devise is a fee, and assert that he has neither an estate for life or for any other period by the terms of the will, but has merely the use of the stock and farming utensils (with which the executors were to stock the farm after the widow's death), and to enjoy the benefits arising therefrom during his life; and at his death his issue, if any, are to have the benefit of said stock and utensils.

We think the plain purpose of the agreement and the intention of the parties as regards the farms was to put the several children in possession of them presently, then, immediately, at that time; to stock them then instead of after the death of the widow, and to give them the use and occupation of them, so that they might enjoy the benefits from then on. In other words, the future occupation and enjoyment of them, postponed by the will until after the death of the widow, was changed by the agreement to a present, an immediate occupation and enjoyment. One fact tending to show how the parties regarded the matter is the stipulation in the agreement that neither the widow nor the estate should be liable thereafter for the expense of running the farms, or for the taxes or repairs, but all should be paid by the respective occupants. They were not merely to have the benefit of the stock, crops, etc., either then on or to be put on the farms, but the farms and the stock, crops, and the appurtenances. Each was to have, if the agreement means anything, the full use of the farm without restriction or reservation, except what was reserved by the widow in the "Home" farm. In this way the "immediate provision" for the children was made and agreed upon.

Except as therein reserved, the widow relinquished and released her right to the use and occupation of the farms and to the rents and profits thereof. The agreement binds all the parties, the widow, children and executors. She can not demand and recover back possession, or recover the rents and profits of the farm. She would be estopped from doing so. It is said the use of the word "present" in the agreement, "a present right to occupy," implies that the right might be terminated any time. This by no means follows. The word was used in the sense of "at once," "immediately." The occupation was to be an immediate one. From that time on each was to have the full use of the farm set apart by the will, with stock, crops, implements, etc., then upon it and to be put upon it.

The agreement did not attempt to change the legal effect of the language of the will devising the farms. Does the devise of the "North Wales" farm to John G. C. Armstrong give him a fee? It is said the testator gave him the use for life of the stock and farming utensils, with which the farm was to be equipped after the death of the widow, and at his death gave the use of the same to his issue. It is too plain for argument that the testator did not intend to simply give the son the mere use and enjoyment of these things. The executors were to equip the farm "for the use and occupancy" of the son during his life, he "to receive, have and enjoy all the benefits therefrom"—that is, the farm and equipment; and at his death his issue, if any, are to receive the benefits. What benefits? The farm and its stock, implements and equipment.

The meaning of the clause and the intention of the testator is to give the use and occupation of the farm to the son with the equipment, to be made by the executors, for and during his life, with remainder to his issue, if any, and in default of issue to next of kin.

While the language of the devise to John and that to William is somewhat different, the meaning and intent is the same in each. The devise is a life estate to him, with remainder over to his issue, and in default of issue to the next of kin. The devise to William was construed by the Common Pleas of this county to be a fee: Armstrong vs. Michener, 10 Montg. Law R., 13, opinion by Swartz, President Judge, and affirmed in 160 Pa., 21, upon that opinion. In our judgment that decision rules this case. It is unnecessary to cite the authorities therein referred to. One paragraph of the opinion we quote as directly bearing upon the controversy here, and as fully disposing of the question of the legal effect of the devise of "North Wales" farm to John:

"We have a life estate in the son, William (John), and after his death a devise to the issue of William (John); and in default of such issue, to the next of kin. The word 'issue' in such connection is a word of limitation, and not a word of purchase, and gives to William (John) an estate tail, which by force of the act of April 27, 1855, P. L. 368, becomes an estate in fee simple."

The fee being vested in the said John G. C. Armstrong by the devise in the will subject to the life estate of the widow, and the possession, use and occupancy of the farm being in him by force of the agreement, wherein the widow relinquished her estate to him, it fol-

lows that he has all the rights of owner, and is entitled to the money in the hands of the executors which they received in payment of the fire loss aforesaid.

And now, December 7, 1903, after hearing and due consideration, it is ordered, adjudged and decreed that William G. Armstrong, Charles S Knapp and Moses R. Knapp, surviving executors of William Armstrong, deceased, do pay to John G. C. Armstrong the sum of one thousand dollars in their hands, being the amount received by them from the Union Mutual Fire and Storm Insurance Company, of Norristown, in payment of loss by the burning of the building on the farm of said John G. C. Armstrong.

Court of Quarter Sessions of Montgomery County.

In re Vacation of Road in Cheltenham Township.

A petition prayed for a jury to vacate and lay out a new road in place of the one vacated The old road was fifty feet in width. The jury vacated the old road and laid out a new one on its bed forty feet in width, adopting the centre line of the old road as the middle of the new. *Held*, that exceptions alleging that "the court had no power to narrow a public road, either directly or by means of the union of a variety of proceedings," should be dismissed.

Exceptions to report of jury.

Evans, Holland & Dettra, Esqs., for petitioner.

Larzelere, Gibson & Fox, Esqs., for exceptants.

Opinion of the court by Weand, December 2, 1901.

The petition upon which the appointment of the jury was based set forth that an existing public road in Cheltenham township had "become useless, inconvenient and burdensome because the width of said road is excessive and wider than the travel and needs of the public require, and the road is not kept and can not be kept in good repair by reason of its great width, and because of the limited travel thereon the township authorities are not justified in maintaining the road in the same good order and condition as the other roads in the township."

Road in Cheltenham Township.

The prayer was for a jury to vacate and lay out a new road in the place of the one vacated. It was apparent on the face of the petition and it is not disputed that the object was to reduce the width of the road by laying out a narrower one on the bed of the one to be vacated. The old road was fifty feet in width. The jury vacated the old road and laid out a new one on its bed forty feet in width, adopting the centre line of the old road as the middle of the new, thus reducing the width five feet on each side.

Exceptions were filed to the report, and those necessary to be considered raise the question as to the power of the court "to narrow a public road, either directly or by means of the union of a variety of proceedings." Neither counsel nor court can discover any legislation which gives direct authority for this purpose. We can lay out, widen, locate, change or supply unquestionably; and if the tax-payers of a township have no right to be relieved of the expense of maintaining a road out of proportion to the needs of the public, there would seem to be a necessity for legislation upon the subject. We think, however, that this proceeding was regular and justified by existing road laws.

The petition set forth a good reason for the appointment of a jury. Having viewed the ground and decided that the road was useless, inconvenient and burdensome, they report a vacation. By their same order they were empowered to lay out a new road. This road was to be in lieu of the one vacated. If the court did not approve of the vacation, it would also necessarily disapprove of the new road. It was not, therefore, as contended by exceptants, the laying out of a new road on the bed of another. The old road had disappeared with the approval of the court. If we suppose that the petition had only asked for a vacation which had been ended, there certainly could have been nothing irregular at the next term in asking for a new road and the laying it on what had been the bed of the old one. The law allows this dual proceeding to vacate and supply; nor is it inconsistent for a jury to find that a road fifty feet in width is useless because of its width, but that another of less width is necessary.

The present proceeding appears to be sanctioned by the case of Noble Street, 5 Wh., 333, which was a proceeding to lay out a narrower street in the middle of a broader one, and it was held that

every part of the old street not included in the new one should have been vacated.

Church Road, 5 W. & S., 200, was a proceeding to widen a road; but as there was then no authority given the courts to widen, the court said: "That object appears to be unattainable by any other process than vacating and laying out a new."

And now, December 2, 1901, the exceptions are dismissed and reviewers will be appointed on the petition filed.

Court of Common Pleas of Montgomery County.

COMMONWEALTH VS. HENRY B. AUCHY ET AL.

Upon certiorari the justice should return with his record the complaint made before him in proceedings for a summary conviction.

Where all the evidence taken before the justice is returned, and fails to show any violation of the law and no inference of guilt is possible, the sentence must be reversed.

In each of these cases there was a conviction for performing worldly employment on the Lord's day.

The defendants by leave of court certioraried the proceedings before the justice.

Samuel High, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., November 12, 1903.

In each case the justice failed to return the original complaint. Apparently one complaint was made to answer for several defendants.

The proceedings are defective, but we shall notice only a single matter.

The justice returned all the evidence taken before him, and it fails to support his convictions. The defendants were charged with doing worldly employment on the Lord's day as managers or owners of the Chestnut Hill Park. Certain amusements, such as the caroussel and scenic railway, were in operation at said park on Sunday, the 16th day of August, 1903.

There is not a line of evidence that even suggests that the defendants were in any way interested or connected with the park, either as owners or lessees, or that they had any part in the operation of these places of amusement as owners or managers. It is not shown that they were on the ground or had any control over the operations there conducted. To allow these judgments to stand is to sustain a conviction without any evidence whatever. If the evidence had not been returned and the findings of the justice clearly showed a violation of the law after testimony was taken, it may be that the exceptants would then be without redress. In a summary conviction we can not sustain a sentence where the proceedings show that no law was violated by the accused. "A sentence is reversed if the record does not show the commission of a well defined act that is forbidden by law": Com. vs. Nesbit, 34 Pa., 403.

Violations of the act of April 22, 1794, should be punished. Every citizen who has a due regard for law and the observance of God's day will assent to this proposition. This law is a part of our established customs, and we must protect these customs as essentials to our social life. Much as we may regret the growing tendency to disregard what are termed Sunday laws, we can not convict persons charged with violations in absence of evidence showing guilt.

Where the record contains no definite facts but only a legal conclusion from unrecorded facts, the superior court can not, without compelling a return of the evidence, decide whether the legal conclusion—that is, the conviction of the offence—is right or wrong. In such a case the safety of the citizen requires a reversal of the conviction: Commonwealth vs. Nesbit, 34 Pa., 403. How much more is this true where the evidence is returned but fails utterly in showing an iota of guilt.

And now, November 12, 1903, the proceedings in each of the above cases is set aside and the judgment of conviction in each case is reversed.

KOLB & SCHWENK VS. ALLEN S. HEIST.

Under the act of March 10, 1810, service on the defendant may be made by leaving a copy of the summons at his dwelling-house in the presence of one or more of his family. Where the return of service fails to show that the copy was left at the dwelling-house the service is defective.

The record of the justice to sustain his judgment must state the kind of evidence upon which the plaintiff 's demand was founded, otherwise it would not be a bar to a subsequent suit based upon the same cause of action.

EXCEPTIONS to the record of the justice of the peace. No. 131, October T., 1903.

Wm. F. Dannehower, Esq., for plaintiff.

Wagner & Nyce, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., November 12, 1903.

The record shows that the summons was served on the defendant "by leaving a true and exact copy of the original summons with an adult member of his family."

At the time of service the act of March 20, 1810, was in force. The act requires that service by copy shall be by leaving the copy at the defendant's dwelling-house in the presence of one or more of his family. This service was made May 10, 1883. The principal direction of the statute was disregarded. The summons was not left at the dwelling-house, for aught that appears in the constable's return. The requirements of the act must be substantially followed, otherwise the service is bad where the defendant fails to appear.

The record states that one of the plaintiffs, Henry Schwenk, appeared; but it does not show that any witness was affirmed or sworn to testify. The claim was upon "a promissory note." How the defendant was liable on the note does not appear; nor is it stated that the defendant is maker, endorser or payee of the note.

The fourth section of the act of 1810 requires that the proceedings before the justice "shall be entered at large by him in the docket or book to be kept by him for that purpose, in which he shall state the kind of evidence upon which the plaintiff's demand may be founded."

The record is silent as to the kind of evidence upon which the plaintiff's demand is founded. It is questionable whether there is anything upon the record that could be pleaded as a bar to a subsequent suit based upon the same cause of action.

The justice states that "after hearing proofs and allegations he

entered judgment for the plaintiffs." That he "heard proofs" has been held sufficient to show that a witness was qualified and gave evidence.

In setting aside the judgment we base our action upon the imperfect service and the failure to set out the kind of evidence upon which the plaintiff's demand was founded.

And now, November 12, 1903, the proceedings before the justice are set aside and the judgment is reversed.

JERRY O'NEILL AND MARY O'NEILL, HIS WIFE, VS. PHILADELPHIA RAPID TRANSIT COMPANY.

Service upon the vice president and general manager of a corporation by leaving a true and attested copy of the writ at his dwelling-house with an adult member of his family is in compliance with section 2, clause (b) of the act of April 3, 1903.

Action for negligence may be brought in the county where part of the property of the corporation is situate and where the company transacts a substantial part of its business, although the accident occurred in another county in which the company has its principal office. (See case between same parties, 19 Montg. L. R., 180)

RULE to set aside service of writ.

John Faber Miller, Esq., for plaintiffs.

Larzelere, Gibson & Fox, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., December 7, 1903.

The summons was served on the vice president of the company defendant, who is also described as the general manager of the company. A true and attested copy of the writ was handed to G. P. Kline, an adult member of the family of the vice president, at his dwelling house.

The property of the company is in part situate in the county of Montgomery, and in said county the company transacts a substantial part of its business.

The accident occurred in Philadelphia county. Under section 2 (b), Act of April 3, 1903, the service is good. Charles B. Kruger, the vice president and general manager, is within the class of persons designated in section 2, upon whom service may be made.

And now, December 7th, 1903, the rule to set aside the service is discharged.

IN EQUITY.

JOHN J. NOCTON VS. PENNSYLVANIA RAILROAD COMPANY AND JOHN T. DYER.

Norristown borough by ordinance vacated part of an alley. The Pennsylvania railroad appropriated the alley for improvements to its new station, and erected a high wall across the same at the terminus of its vacated part. The plaintiff owns real estate fronting on the part of the alley now vacated, and asks an injunction to restrain the closing. *Held*, as all the work had been done before the application for preliminary injunction was applied for, it must be refused, as it is not the office of a preliminary injunction to undo what is already completed.

It is not required to give notice of an ordinance vacating part of an alley to an owner of property not actually "abutting on the line of the proposed improvement."

The act of 1891, Sec. 10, giving appeal to court by abutting owners from ordinances relating to streets, does not include ordinances vacating streets.

An ordinance of a town council need not observe the requirements and formalities that the constitution imposes upon the state Legislature.

APPLICATION for preliminary injunction.

Henry Freedely, Esq., for plaintiff.

N. H. Larzelere and *C. Henry Stinson, Esqs.*, for defendants.

Opinion of the court by SWARTZ, P. J., January 7, 1904.

The plaintiff is the owner of a property situate at the southeast corner of Washington street and Strawberry alley. He carries on a coal and feed business at this location. The defendant railroad is located on Lafayette street. Strawberry alley runs from Washington street to Main street and crosses Lafayette and the defendant's railroad at grade.

The plaintiff in the conduct of his business used Strawberry alley in hauling coal and feed from his yard. It was his best passageway because of the location of the Philadelphia and Reading railway on Washington street.

The Pennsylvania Railroad Company has lately constructed a passenger depot on Lafayette street near Strawberry alley. The company desires to eliminate the grade crossing at Strawberry alley and also to use for its improvements part of the alley next to Lafayette street.

The borough of Norristown by ordinance vacated Strawberry alley from the south side of Lafayette street for a distance of about eighty-one feet southwest of said Lafayette street. By the same ordinance the borough authorities vacated part of Shaving alley, which runs parallel to Strawberry alley about two hundred feet east

of the latter alley. Shaving alley was vacated for a distance of forty-two feet immediately south of Lafayette street. This second vacation eliminates another grade crossing over Lafayette street. These vacations were made in consideration of the defendant railroad company providing two other alleys parallel to Lafayette street, between Washington and Lafayette streets. The new alley leading to DeKalb street is twelve feet wide; the one leading to Swede street is twenty feet wide. In constructing the latter alley an existing alley ten feet wide was appropriated. These reconstructed alleys lead into Strawberry alley at the terminus of the vacated portion of Strawberry alley, so that the plaintiff can use Strawberry alley and drive to or from DeKalb street or to or from Swede street to his place of business.

He contends that the vacation of Strawberry alley as set forth will seriously injure his property by destroying access to his coal-yard. He further contends that the actual closing of the part vacated is without warrant of law.

The defendants claim that the borough ordinance was passed under the act of May 16, 1891, P. L. 75, and that this act is a sufficient warrant for all that was done.

At the hearing it was shown that the street or alley was actually closed so far as the vacation extended. A stone wall some seven or eight feet high was erected across the alley at the terminus of the vacated part. Back of the wall, and over defendant's property, the vacated road-bed was filled in, so that the passageway across Lafayette street is completely closed. We might rest the case here without further discussion, for it is not ordinarily the office of a preliminary injunction to undo that which is already completed. A preliminary injunction should not be mandatory: Audenreid vs. Railroad Co., 68 Pa., 370. The defendant company acted under the authority of the borough. The company had the right to assume that the closing of the alley was a lawful exercise of the power conferred by the ordinance—especially so in the absence of any evidence that the plaintiff intended to contest the right. The case does not fall within the rule laid down in Easton Railway vs. Easton, 133 Pa., 505.

Did the borough council comply with the requirements of the act of May 16, 1891, P. L. 75, in vacating the alley? The railroad company is the owner of the land on each side of the alley so far as

the vacation extends. The company petitioned for the vacation. The act declares that the vacation may take place "upon the petition of a majority in interest and number of owners of property abutting on the line of the proposed improvement." The plaintiff claims that he is a party whose land abuts on the proposed improvement.

This ninth section of the act of 1891 was construed in Speer vs. Pittsburg, 166 Pa., 86, and it was there declared that the correct practice is that "the petition must be signed by a majority in interest and number of owners of property abutting upon the parts to be opened or vacated." The plaintiff's property does not abut on the *part* of the street vacated.

If we concede that the plaintiff is an owner whose property abuts on the line of the improvement, we fail to see how he has any redress if the borough made a mistake in deciding he was not a party to be considered in determining the question of majority.

The tenth section of the act of 1891 does not include cases of vacation, and it is this section alone which gives an appeal to the Court of Common Pleas. There can be no appeals to the courts from the action of municipal legislatures except such as are allowed by statute. "Section 10 of the act of 1891 expressly gives the right of appeal to abutting owners from ordinances opening, widening, straightening, extending, grading, paving, macadamizing or otherwise improving any street or alley. Not a word is said about an appeal from ordinances vacating streets." "The omission of vacating ordinances was intentional": Daughters of American Revolution vs. Schenley, 204 Pa., 572.

This case also decides that the state Legislature may confer on councils the right to open or vacate streets without giving any right of appeal to property owners affected by the ordinances. The same ruling is found in Diamond Street, 196 Pa., 254.

If the plaintiff has the right to appeal, which we can not admit, he must raise the question of a majority signature under the proceeding pointed out in the tenth section of the act of 1891. He can not raise the point in a collateral attack, as attempted in this bill in equity: Beechwood Avenue, 194 Pa., 86.

The plaintiff contends further that the ordinance passed under the act of 1891 is unconstitutional, because it offends against Art. III, Sec. 8, of the constitution of the state. It is true the act does

not provide for any preliminary notice to owners whose property may be taken or injured. Under the general borough law of April 3, 1851, such preliminary notice is specified; and yet in ordinances under that act an omission to give the notice does not invalidate the proceeding. The provision for notice is held to be merely directory: White vs. Borough of McKeesport, 101 Pa., 394; Commonwealth vs. Beaver Borough, 171 Pa., 542; Pennsylvania Railroad Co. vs. Greensburg Railway Co., 176 Pa., 559. These were all cases in which the borough ordinances were passed subsequent to the constitution of 1874. If these ordinances were valid, although the act under which they were passed required notice, we fail to see how the ordinance before us is invalid when the act under which it was passed does not even call for a preliminary notice.

It is also claimed that the ordinance is invalid because the title does not disclose the purpose of the act and because the ordinance contains two subjects. We are not prepared to hold that a borough council must observe all the requirements and formalities that the constitution imposes upon the state Legislature.

It required an act of Assembly to bring councils in cities of the third class within this rule: See act of May 23, 1889, Art. IV, Sec. 2, P. L. 277. The case of Norristown vs. Norristown Passenger Railway, 148 Pa., 87, cited by plaintiff, does not support his contention. The case was affirmed upon the opinion of the learned judge in the court below. All that was decided in the court below related to the power of the borough to enact by ordinance a new method of collecting debts. The court ruled that there was no power in a borough council to establish a lien law, or to provide its own method for the collection of claims. In Dillon on Municipal Corporations, Sec. 47, it is said: "The constitutional provision, however, that no bill shall contain more than one subject, which shall be clearly expressed in its title, is limited to state legislation, and has no application to municipal ordinances."

If we were to sustain the plaintiff's contention upon this point, we would, no doubt, seriously embarrass many of the boroughs throughout the county. Much of their legislation would be found invalid. We prefer to pass upon this question at the final hearing, after a fuller discussion of the matter by counsel. It is too important for disposition at a preliminary hearing. We can only say that

so far as our inquiry extends we do not find that the point is well taken by the plaintiff.

Whether a private alley was appropriated by the defendant railroad company can not be determined by the evidence before us. If it be a fact, we fail to see how such act can vitiate the vacation of Strawberry alley.

Whether there is anything outside of the record to impeach the legality of the proceedings under which the ordinance was passed, must be determined by the evidence upon the final hearing. "The ordinance-book is prima facie evidence of the validity of the ordinance; and if anything essential to its validity has been omitted in passing or publishing it, it devolves upon the party resisting it to show such invalidity": Ridley Park vs. Light and Power Company, 9 Superior, 618

And now, January 7, 1904, the application for a preliminary injunction is refused.

SAMUEL HURWITZ AND BESSIE HURWITZ, HIS WIFE, VS. SCHUYLKILL VALLEY TRACTION COMPANY.

No. 115, October T., 1902.

GRACE HORWITZ, BY HENRY HORWITZ, HER FATHER AND NEXT FRIEND, AND HENRY HORWITZ, IN HIS OWN RIGHT, VS. SCHUYLKILL VALLEY TRACTION COMPANY.

No. 116, October T., 1902.

Where a witness testifies that he did not notice any sound of the gong as a street car approached a crossing, and such witness gave no attention to the car but was engaged in work which demanded his time and attention, his evidence can not prevail against the positive declaration of a passenger who says he heard the gong and looked out of the car to learn the occasion for the ringing of the bell and the slow motion of the car.

The promptness with which a car is stopped is convincing evidence of the speed of the moving car.

Negative testimony based upon no facts is but a scintilla as against positive affirmative evidence based upon facts.

A street passenger railway is not liable for an injury to a child where by a sudden and unexpected act the child runs against or directly in front of a moving car which could not be stopped in time to avoid the accident, although the car was running under proper control.

MOTION and reasons for a new trial.

Hurwitz et al. vs. Traction Co.

Evans, Holland & Dettra, Esqs., for plaintiffs.

Larzelere, Gibson & Fox, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., December 7, 1903.

Esther Hurwitz, the daughter of Samuel Hurwitz, was killed at the intersection of Main and Cherry streets, in the borough of Norristown. In crossing Main street she was injured by a passing trolley car, and her injuries resulted in death. Grace Horwitz, the daughter of Henry Horwitz, was her companion, and she too was injured in the same accident. It is claimed that the death of Esther and the injury to Grace were occasioned by the negligence of the defendant company in the operation of its street car.

The two cases were tried together, and the jury rendered verdicts in favor of the defendant company.

It is contended on the part of the plaintiffs that the court did not, under the evidence produced, properly submit to the jury the question of negligence on the part of the defendant company.

The reasons assigned for a new trial apply to the charge of the court in the comment upon ringing the bell, the speed of the car, and the duty of the motorman in approaching the crossing.

The accident occurred on December 19, 1901, a few minutes after twelve o'clock noon. The children were on their way home from school. Esther Hurwitz was in her eighth year; she was a bright child, and large for her age. Grace Horwitz was in her seventh year. They were walking along the east pavement of Cherry street going southward toward Main street. Just before they reached Main street they stopped to look at some Christmas trees. Main street is the business thoroughfare of the town. The trolley track is near the centre of the street.

The distance from the curb, where the children stepped on the crossing, to the nearest rail of the car track is twenty-one feet nine inches. A car was approaching the east crossing at Cherry street, and was moving westward. The conductor rang the bell to stop the car at Cherry street—that is, the order was for a stoppage at the west crossing of Cherry street, and not at the east or near crossing where the children attempted to pass over.

Grace stepped in front of the car and was run down. Esther was not fully in front of the car when she was struck. Her body was found by the front wheel of the car—that is, between the wheel

and the curb from which she approached the track. Her limb was held by the wheel, and it required a slight movement of the car to release her from the pressure of the wheel.

The front of the car moved only four or five feet beyond the east crossing before it was bronght to a full stop—at least this is the testimony of the defendant, and two of the witnesses for plaintiff confirm this evidence on the part of the company.

That the children passed behind a wagon loaded with hay and then stepped in front of the moving car from behind the load of hay, is the only reasonable explanation for the accident under the sworn testimony. That a load of hay passed eastward between the curb and the car moving westward just as the car reached the crossing, is established by the disinterested witnesses who were passengers in the car as well as by the witness who followed the load of hay. How these witnesses can be mistaken we can not comprehend. The car moved slowly; they looked out for the cause, and saw the hay-wagon. After the car stopped and they stepped out, the load of hay was still in view and near enough to satisfy them how the accident occurred. One of the passengers actually saw the children running from behind the hay-wagon, right in front of the trolley car. Whether there was or was not a hay-wagon at the crossing when the accident happened, affords a good illustration of the value of positive evidence as against negative testimony. One witness did not notice the load of hay because he was interested in some other matter, and there was no circumstance to direct his attention to the object. Another sees the load of hay because it is an obstacle in his way and delays his progress. The one does not notice; the other is almost compelled to observe the object.

We "reserved the question whether there was any evidence in the case to be submitted to the jury upon which the plaintiffs were entitled to recover."

After considering all the evidence, we are of opinion that an instruction to the jury to render a verdict for the defendant company would not have been improper.

If there was any evidence of negligence, was it fairly submitted to the jury?

We held that there was no evidence which warranted the court to submit the question as to whether the gong was rung as the car approached the crossing.

Hurwitz et al. vs. Traction Co.

Four witnesses for plaintiffs say they heard no bell. Was their testimony of any value? Were they giving any attention to the car? Mr. Baker was selling trees and flowers at the corner of Main and Cherry streets. The children came to his flowers and remained about two minutes. "I did not know anything then till I heard the motorman halloo, and that drew my attention to the car, and they were just knocking the two little children." Question. "When you first observed the car did you or not pay any attention as to the way in which the car was running?" Answer. "I could not say, for I did not hear nothing, only the motorman halloo. I could not say whether it was running very fast or what. I did not hear any bell ring." He did not know what the car was doing. He evidently did not know there was a car in sight until the collision took place. He stood on the street because his business place was at that point. He was not looking for a car or waiting to take passage. Cars passed him every few minutes. He did not even see the children after they left him until they were struck. Why should he have heard the signal of this particular car any more than the gongs of one hundred others that may have passed his corner while he was waiting for customers to buy his trees? There was nothing to call his attention to the car as it approached the crossing. It is not surprising that he did not hear the bell; under the circumstances testified to by him there would be a surprise if he said that he did hear it even if it was rung.

What was said about Mr. Baker applies with equal force to Mr. Cramer. He was walking along the street. He says, "I did not see anything before the children were struck." His attention was not called to the car. He did not see it except at the moment of the accident. His back was toward the approaching car. He did not intend to cross Main street; there was no occasion to watch for a car. How can any one who was so indifferent to the subject that he did not even see the car till it stopped at the street crossing, say whether the gong was sounded before the car reached the crossing?

The testimony of Sarah Raubfogel upon this point is valueless also. She stood at the store door for fifteen minutes. Her employer then called her attention to some matter, and she turned around. She did not see the children except at the curb; then she turned around, and the next thing she saw was the stopping car. She did not even see a hay-wagon during the whole fifteen minutes,

and yet it is certain that one or more loads of hay were in sight on Main street while she was at the door. She did not see the car, and yet it must have passed as she was standing in the doorway.

The remaining witness who heard no bell is Daniel Holland. From the reckless testimony of this witness, his manner and appearance on the stand, and the contradictions in his evidence, no jury could obtain any aid. A verdict based on his testimony should not stand. He saw the children at the curb, and then took no notice until they were struck. In the next breath he says he saw them walking hand in hand from the curb till they were struck. He saw the car coming along at the terrific speed of fifty miles an hour, and in the next moment he declares that after the children stepped down from the curb he "did not see any car, not right there." Then he saw it coming right along above speed from the point he first saw it. When he first saw the car it was about one hundred and twenty-five feet from the crossing. At the speed stated by him it would reach the crossing in one and three-fourths seconds. It is not surprising that he failed to "notice any bell." The wonder is that he saw the car at all in its flying movement.

Not one of these witnesses says that the bell was not rung. All they can say is that they did not notice any ringing.

Mr. Rex, a passenger on the car, says he distinctly heard the ringing of the gong; that he heard it several times before it reached Cherry street. The slow motion attracted his attention; he looked out, saw the load of hay, and satisfied himself that the speed of the car and the sounding of the gong were due to the load of hay. He saw the load of hay at the crossing. Mr. Collins, another passenger, heard the gong ring frequently—at least three or four times. The motorman and conductor also swear positively it was rung.

Under this evidence we could not allow the jury to find that there was negligence in not giving a signal as the car approached the crossing. The burden to show this negligence was on plaintiffs. The evidence of the witnesses for the plaintiffs, when we consider the circumstances under which they say that they heard no bell, is but a scintilla of evidence as against the positive affirmation of the four witnesses who give the reasons for the confidence that is in them: Hauser vs. Central Railroad Co., 147 Pa., 440; Newhart vs. Pennsylvania Railroad Co., 153 Pa., 417; Knox vs. Philadelphia and Reading Railroad Co., 202 Pa., 504.

As to speed but two witnesses testify for plaintiffs—Mr. Cramer and Daniel Holland. Cramer admits that he did not see the car except at the moment it struck the children. How can a witness testify to speed when he saw no motion? How can a car have a speed of fifteen miles an hour, and stop in a space of four or five feet? Plaintiffs' witness, Mr. Baker, says the car stopped in about four feet—that is, the front of the car did not pass over the crossing beyond four feet. Samuel Hurwitz, one of the plaintiffs, says the front of the car passed over the stone crossing.

Nearly all the witnesses, both for plaintiffs and defendant, show that the car stopped almost instantly as it reached the crossing. Those in the car describe the slow motion, and say the motorman had his car under full control. Mr. Johnson fixed the stoppage at the time by the water-plug near the crossing. He says the water-plug was opposite the middle of the car, and the front wheels had not passed over the crossing-stones. The witnesses describe the motion of the car as drifting along under perfect control. It is not necessary to comment further on Holland's speed of fifty miles an hour. What little testimony there is as to excessive speed is a mere guess. As to Mr. Cramer, the only witness we can consider, it was a guess without any facts within his observation upon which he could base his judgment. The promptness with which the car was stopped clearly shows that it was running slowly. The evidence of speed was not sufficient to show negligence under such circumstances: Smith vs. Railway Co., 187 Pa., 451.

We did not go this far, however, for we submitted to the jury the question whether the car was under control and approached the crossing with due care. We said, "We will leave to you, gentlemen of the jury, to find what the actual speed of the car was as testified to by the witnesses. . . . There is no evidence here under the law that would justify you in finding that the car was going fifty miles an hour or even ten or fifteen miles an hour." "It is not for me to say how fast this car was going. That is a matter entirely for you when you come to consider the evidence of the witnesses who testified."

Was there error in our instruction to the jury as to the duty of the motorman in approaching the crossing?

We were asked to say that a street-car must be checked or stopped at crossings. We did not think it was our duty to tell the

jury that the motorman must stop his car at a crossing. This construction would have required us to direct a verdict for the plaintiffs. The motorman did not intend to stop at this crossing. All of our answers and instructions were based upon the theory that there was no legal requirement to stop simply because a team was passing over the crossing as the car approached. The instructions given by the court are submitted for application to the particular facts before the jury, and not for application to a hypothetical case.

Our answer to the plaintiffs' second point, we think, covered the case. We were asked to say, "Where one is in charge of a vehicle approaching a public crossing he should approach the same recognizing the fact that people might attempt to cross at that street, and that it is his duty to have his vehicle under such control that if occasion should require he would be able to stop it. And if his view of the crossing is obstructed, and he can not determine whether people are likely to pass over the same in front of his vehicle, he should approach the crossing with greatest care." We answered, "That is true, except that I can not say he must use the greatest care, but he must use greater care because of the obstructed view. He must use care according to the circumstances that exist. The greater the danger the greater the care to be exercised." To say that the greatest care must be exercised may mislead the jury. Greatest care would insure against accident. Care that makes an accident impossible is not required. Greatest care in the case before us might mean that the car must stop before it reaches the crossing; the conductor must run ahead, stand on the crossing, and by force, if necessary, allow no one to step in front of the car as it passes over the crossing. The children were not passengers on the car. The company did not owe the degree of care that is due to a passenger.

We instructed the jury to find from the evidence whether the motorman was negligent in approaching the crossing, whether he kept up a proper lookout, and whether he had his car under control as he approached the crossing. We called attention to the loaded hay-wagon, and told the jury that the obstructed view imposed a higher degree of care upon the motorman. We did not take from the jury the right to find whether there was negligence in approaching the crossing.

To compel a car to stop for a passing team at the crossing is

to give the vehicle the superior right of way on the highway. If the car stops for one wagon, another may follow in the immediate rear, and the car must stop till the line of carriages passes. A car hampered in this way can make no progress on the leading thoroughfare in a town of the size of Norristown. The rights of the electric cars on their tracks are superior to those of the traveling public: Gilmartin vs. Transit Co, 186 Pa., 193; Burk vs. Traction Co., 198 Pa., 497. This superior right is of little value if passing teams may hold a street-car as long as the vehicles see fit to obstruct the crossing between the curb and the approaching car. "These passenger railways are created to facilitate the movements of the general public, and to furnish rapid transit for citizens from their homes to the business centres of the city. They are practically indispensable in all great cities. . . . The purpose of their owners and the demand of the public are that the greatest rate o speed consistent with the safety of other persons using the street or highway shall be maintained": Kline vs. Traction Co., 181 Pa., 276. The cars can not meet this public demand if they must await the convenience of passing teams or if the motorman must anticipate that persons will dart out from behind moving vehicles and run in front of his car.

The cases cited to support the doctrine that this car should have stopped until the hay-wagon had safely passed beyond the crossing do not sustain any such rule. In Maher vs. Philadelphia Traction Co., 181 Pa., 391, the evidence tended to show that the car was going at an unusually high rate of speed, and that no signal was given as the car approached the crossing where the child was struck. In Christian vs. Commercial Ice Co., 3 Pa. Super. Ct., 320, the driver saw the lady at the crossing, but instead of approaching with care he "recklessly kept his unwieldy team at a jog trot, with knowledge of the defective brake, and was the sole cause of the injury." In Miller vs. Traction Co., 201 Pa., 175, there was evidence of excessive speed, and also evidence that the person about to cross the street listened for the signal of an approaching car and heard no noise of any kind. The case of the lower court was affirmed because the judges who heard the case were equally divided in opinion.

There is no evidence that cars were accustomed to stop at the Cherry street crossing except to leave off and take on passengers.

There are numerous cases, which it is not necessary to cite, that show that a street passenger railway is not liable for an injury where the child by a sudden and unexpected act runs against or directly in front of the advancing car, which could not be stopped in time to avoid the accident.

The reasons for a new trial are dismissed and new trials are refused. The prothonotary will make the entry in each case.

EDMUND J. HEDDEN, TRADING AS E. J. HEDDEN, VS. FRANCIS KING WAINWRIGHT, OWNER OR REPUTED OWNER, AND SHERMAN OREM, TRADING AS SHERMAN OREM & CO.

The act of June 4, 1901, P. L. 431, does not require a mechanic's lien to contain, or have attached, a copy of the plans and specifications.

Where the agreement provides that "in case of dispute respecting the true construction or meaning of the drawings or specifications, or as to what is extra work, outside of the contract, the same shall be decided by the architect, and his decision shall be final and conclusive," the sub-contractor can not recover for alleged extra work, when the architect decides against him as to what constitutes extra work.

Sci. fa. sur mechanic's lien. No. 20, March T., 1903.

Evans, Holland & Detta, Esqs., for plaintiff.

Larzelere, Gibson & Fox, Esqs., for defendants.

Opinion of the court by WEAND, J., December 7, 1903.

HISTORY OF THE CASE.

The case was submitted to the court without the intervention of a jury under the act of April 22, 1874, P. L. 109. The plaintiff is a sub-contractor, and files his lien to recover the sum of $4,599.50, with a credit of $3,473.50—balance, $1,126. Of this amount $4,200 was the agreed price between the plaintiff and contractor; the balance is for extra work—extra stone work, $258.75; cement, $125; extra work, $15.75. The contract between the owner and the contractor was not filed in the office of the prothonotary of the county.

The only defence to the claim is to the charge for extra work; but defendant also claims a deduction of $250 for delay. Defendant made a motion to strike off the lien, which motion was over-

ruled by the court without prejudice to defendant's right to defend on the trial, for the reasons assigned.

FINDINGS OF FACT.

1. The contract for the building of the house was between Sherman Orem, trading as Sherman Orem & Co., contractor, and F. King Wainwright, owner, dated September 16, 1901, and provided for the completion of the building on or before May 1, 1902, under penalty by way of liquidated damages of ten dollars per day for each and every day thereafter that the work remains uncompleted.

2. The contract provided that the contractor would make no claim for extra work unless the same was done upon the written order of the owner, countersigned by the architect.

3. The contract between the contractor and owner was not filed in the prothonotary's office, and plaintiff had no notice of, or knowledge of, the contents thereof.

4. Plaintiff has fully complied with the requirements of the act of June 4, 1901, P. L. 431, in relating to the giving notice of his intention to file his claim and of his having filed it.

5. The contract between plaintiff and Sherman Orem is contained in a letter of September 25, 1901, from plaintiff to Sherman Orem, in which plaintiff proposes to do certain work, furnish labor and materials "according to the plans and specifications prepared by Charles Barton Keen, architect, for the residence of Mr. Francis King Wainwright, at Bryn Mawr, for the sum of $4,200," and the acceptance by Mr. Orem under date of September 30, 1901. In Orem's acceptance it is provided: "Should any dispute arise respecting the true construction or meaning of the drawings or specifications, or as to what is extra work, outside of the contract, the same shall be decided by the architect, and his decision shall be final and conclusive; and no work of any description shall be considered as extra work unless a separate estimate in writing for the same shall be submitted to us and an order be obtained in writing."

6. The item of $258.75 is for extra stone work in laying foundations. The building was being erected on the side of a hill; and when work was commenced by plaintiff he discovered that, as he viewed the plan, the foundation on the lower part of the ground would not be deep enough to support the building.

7. Frank Piot, who was stone mason and superintendent for plaintiff; Mr. Raiguel, representing Mr. Keen, the architect; and Mr. Kreitsburg, representing Mr. Orem, met on the ground, and all agreed that according to plaintiff's view of the plan the foundation would not be deep enough, and he was directed to go deeper.

8. At said meeting plaintiff's agent claimed that it would be extra work. Mr. Raiguel, for Mr. Keen, referred them to the plans and specifications. Mr. Orem agreed that it was extra work. Mr. Keen says the plans and specifications clearly provided for the foundation as laid.

9. The specifications, page 8, provide: "Any walls where the ground falls below the cellar bottom are to be carried down to a sufficient depth to a sure foundation on good firm earth, and to be not less than three feet six inches below finished grade. All walls not enclosing cellar and for parts not excavated to be not less than three feet six inches below finished grade."

"Depth of foundation walls to be as shown on drawings."

"The grade line shown on the drawings is the established grade or line to which the ground will be graded at completion (the dotted lines showing approximately the present grade), and is not to be taken for the present grade of the lot."

"Where finished grade line falls below the level of the cellar, if any occurs at any place, the walls of such portions are to have trenches excavated for not less than three feet six inches below the grade line."

10. The architect has refused to certify the work claimed for under this item as "extra work."

11. The plans called for a semi-circular-headed door; the mill men in making the frame had made an error and sent a square-headed door, which was built in in that manner instead of having it arched. The architect ordered it taken out and a proper one built. For this change plaintiff claims $15.75 extra. The error was caused by Mr. Orem's men.

12. The item of $125 for cement is not disputed.

13. The building was not completed until July 11, 1902.

14. There is no evidence to show what damage, if any, the owner suffered by the delay in completion of the building, or how much is attributable to plaintiff.

15. The contract between plaintiff and Orem does not provide for a penalty for delay.

CONCLUSIONS OF LAW.

1. Plaintiff is not entitled to recover for item $258.75, it not being extra work.

2. Plaintiff is not entitled to recover item $15.75, it not being extra work.

3. Plaintiff is not to be charged for delay.

4. Plaintiff is entitled to a verdict for $851.50, with interest from October 27, 1902.

ARGUMENT.

The reasons for striking off the lien, and which were also urged on the trial, assigned amongst others that the record shows that notice of the filing of the claim was not given as required by law.

This statement is not sustained by the lien or the evidence; also that the lien does not show proper itemized statements of the claim annexed. As the contract was for a round sum, and that part is not disputed, and as we have disallowed the items for extras, this reason also falls, the charge for cement being conceded; also that the claim as filed does not contain or have attached a copy of the plans and specifications.

The act of 1901 does not in terms require this to be done; and, in fact, in many cases would be impossible or at least impracticable. The case of Knolly vs. Horwarth, 27 C. C., 545, is not in point, and is not applicable to the facts of this case. The contract between Wainwright, owner, and Orem, contractor, not having been filed, and no notice thereof having been given to Hedden, sub contractor, he is not bound by the provisions of the original contract, but he is subject to the contract between himself and Orem, and under it his claim for extras depended upon his obtaining an order in writing from the architect or owner.

We are of opinion that the work claimed as extra was not of that character. An inspection of the ground would have shown that the foundations must as a matter of safety go deeper than the plan showed, if Hedden's view of it is correct. His first duty then was to refer to the specifications, where he would have seen that "any walls where the ground falls below the cellar bottom are to

be carried down to a sufficient depth to a sure foundation on good firm earth, and to be not less than three feet six inches below finished grade." Other parts of the specifications also provide for the same depth.

The specifications are intended to explain and make clear the plans; and where the latter is not clear the former must be resorted to in order to have a proper understanding of what is intended.

But if we are in error the plaintiff is met by the fact that he had no order in writing or anything which amounted to a waiver. Raiguel was not authorized to waive this part of the agreement; and the evidence shows that Hedden's men insisted upon the work being extra, whilst he (Raiguel) referred them to the plans and specifications. There is a conflict of testimony between Piot for Hedden and Raiguel for Keen, and the plaintiff has failed to establish by the weight of the testimony that Raiguel agreed that the work was extra, even if he as agent or Keen as architect could waive the requirements of the contract.

Again, it is provided in their agreement: "Should any dispute arise respecting the true construction or meaning of the drawings or specifications, or as to what is extra work, outside of the contract, the same shall be decided by the architect, and his decision shall be final and conclusive; and no work of any description shall be considered as extra work unless a separate estimate in writing for the same shall be submitted to us and an order be obtained in writing."

The architect gave no order, neither did the owner; and the architect's decision on the trial was against plaintiff. We therefore reject this part of the claim. See Gibbs vs. School District, 195 Pa., 396.

The claim for $15.75, extra work at door, must also be rejected. The plan showed a certain door, and because the carpenter made an error the plaintiff was not justified in following him. An inspection of the plan would have shown the mistake.

We also reject defendant's claim for delay. The agreement between plaintiff and Orem provides for no penalty, and no loss or inconvenience to the owner is shown. There is no evidence, therefore, upon which we could find any amount to be deducted. It would be a pure guess, even if we could find what proportion of the delay should be charged to plaintiff.

Market Co. vs. Lodge.

FINDING AND VERDICT.

And now, December 7, 1903, unless exceptions are filed as provided by law, the prothonotary will enter judgment in favor of plaintiff and against defendant for the sum of $851.50, with interest from October 27, 1902, with costs.

POTTSTOWN MARKET COMPANY VS. STICHTER LODGE.

A holder of bonds seeured by a mortgage to a trustee, etc., can use the interest coupons due as an offset to a debt due by him to the mortgagor, notwithstanding the fact that the mortgage provides a remedy in case of default.

CASE stated.

J. V. Gotwalts and *Henry D. Saylor, Esqs.*, for plaintiff.

J. H. Mazwell, Esq., for defendant.

Opinion of the court by WEAND, J., May 16, 1901.

The plaintiff is lessor of defendant, and sues for rent in arrear Defendant does not deny that the amount is due and unpaid, but claims a set-off under the following circumstances: Plaintiff executed a trust mortgage to secure principal and interest of a number of bonds, some of which are held by defendant. Interest being due and unpaid on the coupons accompanying the bond held by the defendant, demand of payment was made and refused. On the trial the defendant offered the coupons due as a set-off to the plaintiff's claim for rent.

It is contended by plaintiff that under the terms of the mortgage the defendant's only remedy to recover its interest is to present the same to the trustee, or by sale of the mortgaged premises.

As the trustee's only duty is to sell for the benefit of all the bond-holders after a certain number have made request for that purpose, the defendant might be indefinitely postponed.

But the mortgage does not make that course the only remedy, and the case of the Montgomery County Agricultural Society vs. Francis et al., 103 Pa., 378, is exactly in point. It was there ruled that "an action will lie for interest on a bond, notwithstanding the fact that the mortgage securing the bond provides that upon default

in payment of interest the trustee named in the mortgage shall at request, etc., proceed by scire facias to collect interest and principal for the benefit of all the bond-holders equally.

This case presents no unusual features. Plaintiff sues for rent; defendant shows that plaintiff is indebted to him, and presents his admitted indebtedness as an off-set. The trustee in the mortgage is no party to the proceeding; he only becomes active when called upon by the proper parties to act. Why the plaintiff should ask defendant to pay, and yet itself refuse to pay, is difficult to see. There is nothing in the case stated which raises the question of an equity in any persons except the parties to this suit.

We can see no reason why defendant could not bring suit on its coupons, as was done in the case cited; and if so, its right to a set-off is undoubted.

And now, May 16, 1901, judgment for defendant.

Assigned Estate of J. W. Sunderland and Wife.

In the distribution of an assigned estate the wife of the assignor is a competent witness to prove her claim, the husband not contesting.

Clause "c," Sec. 5, of the act of May 23, 1887, P. L. 158, only applies where the husband is claiming the property or is on the side of the creditors as against the wife.

Clause "e," Sec. 5, of said act, does not apply where the husband has been declared a weak minded person.

Notes under seal were held by a woman against a man whom she subsequently married. The only objection to her claim by creditors was want of consideration. *Held*, that as to these claims in the absence of an averment of fraud or mistake she was not in the first instance required to prove consideration.

Exceptions to auditor's report.

Evans, Holland & Dettra, Esqs., for exceptions.

Wagner & Nyce, Esqs., contra.

Opinion of the court by Weand, J., February 15, 1904.

Mrs. Sunderland, wife of the assignor, presented four claims against the fund for distribution. One was on a judgment entered of record after the assignment, and was not disputed. Two were evidenced by judgment notes under seal, executed and delivered to her before her marriage to Mr. Sunderland. The other was executed

and delivered, after the marriage, to E. S. Moser as trustee for Mrs. Sunderland. These three claims were objected to for want of consideration alone. The signatures were admitted to all the claims.

Mr. Sunderland was declared by the court, on January 6, 1902, to be a weak-minded person; but all the notes were executed and delivered when he was competent to manage his own business. To prove consideration Mrs. Sunderland was offered and accepted as a competent witness to sustain her claims under objections from creditors. It is not disputed that, if competent, her claims should be allowed. The auditor allowed the claims, holding that the wife was not incompetent, that Mr. Sunderland was not a lunatic, and that the case was not included in the exception under clause "e," Sec. 5, of the act of May 23, 1887, P. L. 158.

We have personally examined the notes and find they were under seal, and therefore imported consideration and required no testimony in the absence of an averment of fraud or mistake if offered by a stranger: Cosgrove vs. Cummings, 195 Pa., 497; Anderson vs. Best, 176 Pa., 498. If the rule is different when the wife is a claimant, as was held in Wilson vs. Silkman, 97 Pa., 509, and affirmed in Huber's Assigned Estate, 21 Sup. Ct., 612, we do not think it would apply to the two notes admittedly given to her before marriage. There was no evidence to show that they were given in contemplation of marriage or to defraud creditors. As to the trust judgment, however, she is put to proof, and this raises the question of her competency.

In Strause vs. Braunventer, 4 Pa. Sup. Ct., 263, Judge Rice, in speaking of the act of 1887, and particularly of clause "e," Sec. 5, said: "The language of the clause is plain and unambiguous, and there is no justification for construction whereby it shall be extended to cases not expressly excepted from the general rule of competency."

The Legislature by the act of June 25, 1895, P. L. 300, undoubtedly distinguished between a lunatic and a weak-minded person, for otherwise there would have been no occasion for the act of 1895. When the act of 1836, which provided for cases of unsoundness of mind, was passed, the word "lunatic" had a defined meaning, and did not include mere weakness of intellect or a disposition to squander an estate. It was assumed that a person might be sane, and yet unable to properly care for his property although he might

of his person. Under the act of 1836 an adjudication of unsoundness would invalidate acts done during such period of unsoundness, whereas "under the act of 1895 the decree will invalidate future contracts; but it does not appear that it will affect past contracts": Harker's Estate, White's Appeal, 176 Pa., 19.

Under the act of 1836 a committee can be appointed to take charge of both the person and estate of the lunatic, whilst under the act of 1895 the committee has charge only of the estate of the weak-minded person. As the act of 1887 was intended to extend the competency of witnesses, the court ought not to read into it cases not expressly excepted. We think, therefore, that the auditor was correct in his conclusion that Mrs. Sunderland was not incompetent because of her husband's condition.

Is she competent under clause "c," Sec. 5, of the act of 1887, which reads, "nor shall husband and wife be competent or permitted to testify against each other except," etc.? If this is a proceeding against the husband, she is excluded. The contest, however, is not adverse to her husband, who does not contest her claim. By the giving of the notes and bond he admits his indebtedness, and he would be a competent witness to prove the claim. Where he is competent, why would she not also be competent? It is only when they are adverse to each other that the prohibition applies. Here the contest is between the claimant and the husband's creditors, and the latter alone dispute the claim. How can it be said that the action is against the husband when he does not dispute the claim, but by not contesting impliedly and in fact admits its justice. There is no reported case precisely in point since the act of 1887, but decisions in analogous proceedings would seem to justify our conclusions.

Norbeck vs. Davis, 157 Pa., 399, was an interpleader issue where the wife claimed the property and the husband disclaimed ownership. The contest, therefore, was between the wife and creditors of the husband. The wife was held to be a competent witness to support her title. "If the husband actually claimed the property, and were on the side of the execution creditor, then the antagonism which the law contemplates would exist, and the wife would be incompetent." In the course of the opinion Mr. Justice Dean says: "How does she testify against him when she asserts a right which he concedes? Contention must result from the individual hostile

assertion of property in the same thing before the 'against each other,' which disqualifies, can be said to exist."

Meyers's Appeal, 77 Pa., 482, is more closely in point. The husband had assigned for the benefit of creditors and the wife presented a note under seal given by her husband. Both husband and wife were permitted to testify. The case arose before the passage of the act of 1887, and the competency of the witnesses was not questioned.

Ziegler's Appeal, 84 Pa., 342, also arose in a case where the husband had assigned for creditors and the wife claimed as a creditor. The husband testified in favor of her claim. The case arose before 1887.

These cases all proceed upon the theory that when the husband is not disputing the claim of the wife the proceeding is not hostile, and there is no "against each other" as contemplated by the act of 1887.

We are of opinion that Mrs. Sunderland was a competent witness to prove all her claims; and as the auditor has found that she did so, the exceptions must be dismissed.

And now, February 15, 1904, the exceptions are dismissed and the report of the auditor is confirmed.

ANNIE H. STURZEBECKER VS. INLAND TRACTION COMPANY AND PHILADELPHIA AND LEHIGH VALLEY TRACTION COMPANY.

In an action of tort against two or more, unless there is evidence of a joint tort by at least two of the defendants there can be no recovery against either.

The evidence in this case showing that all the acts complained of were committed alone by one of the defendants, the court directed a compulsory non-suit.

"The allegation and the proof must agree in cases of tort as in other cases."

MOTION to take off non-suit. No. 11, June T., 1903.

Henry Freedley and *A. R. Place, Esqs.*, for plaintiff.

Larzelere, Gibson & Fox, Esqs., for defendant.

Opinion of the court by WEAND, J., February 23, 1904.

The action, it will be observed, is against two corporations, and damages are claimed as resulting from the construction and operation of a trolley road.

The statement alleges that "the Inland Traction Company located and constructed a trolley railway," and "about the time of the said construction leased to or in some other manner unknown to the plaintiff merged with the said defendant, the Philadelphia and Lehigh Valley Traction Company, and thereafter by virtue of said merger operated the said railway," etc.; also, that said Inland Traction Company set poles in front of her property, "and after said construction the said defendants through said lease or merger operated and still do operate the same"; that "in the course of said construction the said defendants broke down, destroyed and blocked the drain of said plaintiff"; that "by reason of the construction of the trolley railway by the said defendants and the said setting of said poles," etc., and the operation of the road, damage has been done plaintiff.

It will be seen that the Inland Traction Company is charged with the construction and operation of the road, and the only connection that the Philadelphia and Lehigh Valley Traction Company has with the case is the mere assertion in the statement of a lease or merger between the two companies, of which fact there was not a particle of proof nor was there any evidence whatever that said last mentioned company has done any act or thing of which the plaintiff complained. Her own statement and her own evidence attribute all the alleged wrong doing to the Inland Company.

This brings the case within the rule that "in a suit for a joint tort there can be no recovery upon proof of one or more separate torts. When a joint tort is charged, a joint tort must be proved in order to sustain the action. The allegation and the proof must agree in cases of tort as in other cases": Goodman vs. Coal Township, 206 Pa., 621.

And now, February 23, 1904, the motion to take off the nonsuit is overruled.

DENNIS MCFADDEN AND SUSAN MCFADDEN VS. PHILADELPHIA AND READING RAILWAY COMPANY.

Plaintiff claimed compensation for damages to land committed since he obtained title. Evidence of acts committed prior to the inception of his title were not admissible.

Where the verdict is for defendant, and no question of law is reserved, there can be no judgment for plaintiff *non obstante veredicto.*

MOTIONS for new trials and for judgment *non obstante veredicto.* Nos. 87, 88 and 89, March T., 1903.

Henry Freedley and *Jacob V. Gotwalts, Esqs.*, for plaintiff.

Montgomery Evans and *James Boyd, Esqs.*, for defendant.

Opinion of the court by WEAND, J., February 23, 1904.

These three cases were tried before the same jury, and in each case a verdict was rendered in favor of defendant.

Motions for new trials and for judgment *non obstante veredicto* have been entered in each case.

The reasons for a new trial are:

1. The court erred in limiting recovery to time of ownership.
2. The verdict is against the evidence.
3. The verdict is against the law.

The statements set forth the cause of action as follows: "Since plaintiff acquired title to said premises the said defendant, for its own convenience in maintaining and operating the said railroad, has raised the grade of said Washington street about three feet, by said change cutting off, obstructing and preventing access to said premises by and along said Washington street, so that said premises are inaccessible and impaired and damaged in value to the sum of," etc. In one case the raise is said to be four feet, and in another case the word "undrainable" is introduced; in other respects the statements are similar.

Two questions arose. First, did the company raise the grade; and, if so, did they do defendant damage?

The cases were tried upon these issues, and found in favor of defendant.

No complaint is made of the charge of the court except to that part wherein we told the jury that the damages, if any, must be confined to the period of plaintiff's ownership.

The statements show that the acts complained of were com-

mitted "since plaintiff acquired title"; and there could be no error in confining a recovery to such period.

The suits were common law actions in trespass, and the facts were for the jury. The plaintiff's claim that if defendant raised its tracks, although no appreciable damage was done, he still is entitled to a verdict; but as the jury has found a general verdict for defendant, we can not say that defendant did any wrong as complained of. In addition, the measure of damages, as introduced and contended for by plaintiff, was the depreciation of the market value of the properties; and there was no pretence of trying the cases on the theory of a nuisance.

We are of opinion that no good reason has been assigned why a new trial should be granted.

The verdict being for defendant, and no question of law having been reserved, we can not enter judgment *non obstante veredicto*": Hosler vs. Hersh, 151 Pa., 415.

And now, February 23, 1904, in each case the motion for a new trial is overruled, and motion for judgment *non obstante veredicto* is also overruled; and judgment is directed to be entered in favor of defendant on the verdicts on payment of the verdict fee.

COMMONWEALTH OF PENNSYLVANIA VS. GEORGE R. MITCHELL.

In summary conviction proceedings before a justice of the peace, a writ of certiora should be allowed by the court to make it effectual.

Where the proceedings are clearly irregular, an allowance *nunc pro tunc* will be entered.

Where the defendant is denied a hearing by himself and his witnesses, the conviction can not be sustained.

The rules of court should be elastic enough to prevent a miscarriage of justice where imprisonment is involved.

EXCEPTIONS to proceedings before justice of the peace. No. 79, December T., 1903.

Geo. W. Zimmerman, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., February 15, 1904.

The defendant was convicted before the justice of the peace on a charge of cruelty to a dog. At the hearing the defendant de-

manded to be heard by his witnesses. The justice held the case under deliberation and decided not to hear the defendant. This refusal is entered upon the record of the justice, and is set forth in his return to the court. Under the summary conviction a fine of ten dollars and costs was imposed on the defendant.

No application was made to the court for an allowance of the writ of certiorari. When the prothonotary issued the writ the defendant entered bail in fifty dollars. The writ was made returnable to the December term. No exceptions were filed until the 30th day of January, 1904.

The defendant should have applied for a special allowance of the writ: Commonwealth vs. Antone, 22 Pa. Super. Ct., 412. He should have filed his exceptions, under our rules of court, "not later than ten days after the term to which the certiorari is made returnable." At the argument no one appeared on behalf of the commonwealth. There was no motion to quash the writ or to dismiss the exceptions.

A summary conviction under the act may be enforced by imprisonment. No trial involving such serious consequences can be sustained where the accused is denied a hearing by himself and his witnesses. Technical objection to the writ of certiorari should not prevail where imprisonment without a hearing is involved. Had the defendant applied for the writ, it would have been allowed at once. We see no good reason for refusing to do now what we would have done then. We allow the writ *nunc pro tunc.*

The exceptions were not filed in time under our rules of court. The error before the justice was apparent on the face of his record. The moment the return was filed the fact appeared on the records of our court that an improper conviction was entered against the defendant. The frank statement of the justice noted on his return was sufficient to set aside the proceedings. The rules of court are elastic enough to prevent a miscarriage of justice.

And now, February 15, 1904, the exceptions are sustained and the proceedings before the justice set aside.

HIRAM M. JAMES VS. A. L. GREGER.

On a suit on a promissory note, payable at a bank and reading "we" promise, etc., but only signed by one, an affidavit of defence is insufficient which alleges that "it was only signed by one," that "no demand was made of the maker," and that "the goods for which the note was given were billed to her husband," there being no averment that another was to sign the note or that defendant did not receive the goods.

A plaintiff who alleges that he has paid a claim against defendant, but without request, has shown no such priority of contract as will sustain an action in his own name, there being no assignment or authority from the creditor.

MOTION for judgment. No. 43, December T., 1903.

E. L. Hallinrn, Esq., for plaintiff.

E. F. Slough, Esq., for defendant.

Opinion of the court by WEAND, J., February 23, 1904.

The plaintiff's claim is based on two causes of action. One claim is on a promissory note drawn by A. L. Greger to the order of A. L. Greger for $281.18, and endorsed by A. L. Greger, Thomas P. Greger and H. M. James.

The defence to this note is:

1st. "That it reads to be a joint note, reading 'we promise to pay,' when it is only signed by an individual, A. L. Greger."

2d. "No demand for payment is shown by the statement as having been made upon A. L. Greger, the accommodation maker of said note for her husband."

3d. "The articles of merchandise, consisting of farming utensils, amounting to two hundred and eighty-one dollars and eighteen cents, purchased of Hiram M. James, were billed to T. P. Greger, the husband of A. L. Greger, who signed said note for him, being a married woman."

[We quote the language literally.]

This sets forth no defence against the note. It is admitted to be for a valuable consideration for goods purchased of plaintiff.

There is no denial that defendant purchased the goods or that she received them, although billed to her husband; nor is there any averment of liability on the part of her husband, or why he should give a note. There is no averment that more than one person was to sign the note. There was no occasion for demand of payment on the maker, as the note was payable at a bank and the statement alleges a demand there and refusal of payment. The affidavit is vague and not a specific denial of indebtedness.

The other cause of action is for the price of a mower sold to defendant by the International Harvester Company of America.

Part of the written or printed contract between the parties was that the purchaser should execute and deliver to the company her note for $45, payable on the first day of September, 1903.

The plaintiff alleges that he was the agent for the company in making the sale, and responsible for the price of the machine; that as defendant did not pay the company, he (the plaintiff) did so, "whereby he became the assignee of the company and the absolute owner of the claim." There is no averment that a note was not given according to the contract, and we are asked to assume that the company delivered the mower without compliance with the express terms of the contract.

The affidavit of defence denies a purchase from plaintiff individually, and that there was an assignment to him of the contract The payment to the company, alleged to have been made by the plaintiff, was after the claim became due, and there is no averment that it was ever assigned to him. He has shown no such priority of contract as will entitle him to sue in his own name for this part of the claim.

We are of opinion that the affidavit of defence to the note is insufficient, but is sufficient to prevent judgment for balance of claim.

And now, February 23, 1904, judgment is directed to be entered in favor of the plaintiff and against defendant for the sum of $281.18 with costs of protest, and interest from September 4, 1903, with costs, according to act of July 15, 1897, P. L. 276, with leave for plaintiff to proceed for the recovery of the balance of his claim.

In re Borough of Collegeville.

The act of May 24, 1878, P. L. 129, providing for the assessment of damages in cases of the change of grade of streets, is not repealed by the act of May 16, 1891, and its supplement of June 12, 1893.

Proceedings for the recovery of damages for change of grade are properly instituted under the act of 1878.

Application to set aside appointment of jury to assess damages for change of grade.

J. P. Hale Jenkins, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., February 15, 1904.

We appointed the jury under the act of May 24, 1878, P. L. 129, to assess damages for the change of grade made by the borough of Collegeville on streets in front of the property of Dr. James Hamer.

The borough filed a protest alleging that the act of 1878 was repealed by the act of May 16, 1891, and its supplement of June 12, 1893, and that the appointment under the act of 1878 was therefore void.

That the act of 1878 was not repealed by the acts of 1891 and 1893 is decided in Seaman vs. Borough of Washington, 172 Pa., 467, and Bowers vs. Braddock Borough, 172 Pa., 596. In Lewis vs. Homestead, 194 Pa., 199, decided in 1899, the court say, "Where a change of grade is made by authority of the borough, proceedings for the recovery of damages are properly instituted under the act of May 24, 1878.

We now reaffirm the appointment of the jury named January 5, 1903, and direct the jury to make report to the next term of court, to wit, March term, 1904.

The application to set aside the petition for a jury is refused.

ANNA M. HOOVER, ADMINISTRATRIX OF FRANK A. HOOVER, DEC'D, VS. SCHOOL DISTRICT OF LOWER MERION TOWNSHIP.

A school district is not liable for the cost of printing a list of delinquent tax-payers not ordered by them.

The township auditors can not bind the school district for such printing.

MOTION for a new trial. No. 76, June T., 1903.

Wanger & Knipe, Esqs., for plaintiff.

Evans, Holland & Dettra, Esqs., for defendant.

Opinion of the court by WEAND, J., February 23, 1904.

The board of township auditors directed the printing of a report containing the names of delinquent tax-payers as reported by the tax-collector. The advertising was charged to the school dis-

trict, which had not ordered it, and which refuses to pay. We are not referred to any act of Assembly which authorizes the publication of such list, or of the liability of the school district when it is published by the auditors.

The approval of the bill by a subsequent board of auditors can not fasten a liability on the school district unless the law gives them that power.

And now, February 23, 1904, the motion for a new trial is overruled and judgment is directed to be entered on the verdict on payment of the verdict fee.

In re Bryn Mawr Trust Company, Surety for Levi S. Cline, Treasurer of Lower Merion Township.

The treasurer of a township of the first class is the collector of taxes, and is bound to the same duties imposed by law upon the collector of taxes in other townships.

When he receives the duplicate he becomes liable to account for the whole amount of the duplicate, subject to exonerations and allowances, and his liability to account is not confined alone to the amount actually collected.

Until his accounts are settled by the township auditors, a suit upon his official bond is premature and unauthorized.

The act of April 28, 1899, P. L. 104, does not provide a method for the collection of taxes essentially different from that in other townships.

The various acts of Assembly relating to the collection of township taxes are in *pari materia*, and must be construed together.

Appeal from the settlement of the accounts of said treasurer by the auditors. No. 14, March T., 1904.

Henry M. Brownback, Esq., for plaintiff.

Rowland Evans, Esq., for defendant.

Opinion of the court by Weand, J., February 23, 1904.

The township of Lower Merion is a township of the first class under the provisions of the act of April 28, 1899, P. L. 104.

Levi S. Cline was elected treasurer of the township in the year 1900 for the term of three years, and served in said office until the first Monday of March, 1903, when his term expired.

At that time certain taxes, charged upon the tax duplicates, which had been delivered to said Cline as treasurer (as provided in

said act), for the years 1900, 1901 and 1902, still remained uncollected.

The township auditors in auditing and settling the accounts of said Cline, as treasurer, with the township, have charged up against him all these balances of uncollected taxes after the allowance of certain abatements or exonerations and amounts paid out or to his successor by him, and thus find him in their report to be indebted to the township as follows:

1900 tax uncollected, ...	$341.67
1901 tax and penalty uncollected, ...	1,853.27
1902 tax and penalty, ...	3,853.81
	$6,048.75
Less commissions thereon, ...	302.43
	$5,746.32

This appeal is from the report of the auditors.

The correctness of the treasurer's accounts is in no wise impeached, and it is not claimed that he has not fully accounted for or paid or handed over to his successor in office all moneys which were received by him from any source on behalf of the township.

The only question we are called upon to decide is whether the treasurer, under the said act of April 28, 1899, is liable to account for the whole amount of the tax duplicates delivered to him; or whether he is liable to account for only "all moneys belonging to the township funds that may come into his hands." The contention of the township is that the treasurer on receipt of the duplicate for any year is immediately chargeable with the whole amount of the duplicate. The treasurer's contention is that he only becomes liable for the money that comes into his hands.

The sureties are prosecuting this appeal; and our first duty, therefore, is to see what obligation the treasurer has undertaken. By Sec. 13 of the act: "Each township treasurer shall give a bond in the sum to be prescribed by ordinance, and at least equal to the probable amount of the annual township tax, with sureties to the satisfaction of the board of township commissioners, which bond shall be conditioned for the faithful performance of the duties of his office, for a just account of all moneys belonging to the township funds that may come into his hands, for the delivery to his successor in office of all papers, books, documents, and other things held

in right of his office, and for the payment to such successor of any balance in money belonging to the township that may remain in his hands on the settlement of his accounts.

The first condition of the bond is "for the faithful performance of the duties of his office." His duties are set forth in Sections 15 and 16. Sec. 15 reads: "Whenever a tax is levied by a board of township commissioners, it shall be the duty of the board to forthwith deliver a duplicate of the assessment of such tax to the township treasurer, who shall thereby become authorized to receive and collect from the tax-payers the amounts with which they stand charged respectively, and to give receipts therefor. On receipt of such duplicates it shall be the duty to give notice," etc.

Sec. 16: "At the expiration of three months from the time of receiving the duplicate of any tax assessed as aforesaid, the treasurer shall proceed to collect the same from the tax-payers, and to that end may appoint one or more deputy collectors; and said treasurer and his deputies shall have and exercise all powers conferred by existing laws on township tax-collectors."

By these sections the treasurer becomes the collector of taxes charged with the duty of collecting the taxes charged against the parties named in his duplicate.

If he does not do so, the township is put to great inconvenience, its creditors are delayed, losses occur by removals or failures, and the whole theory of taxation is set aside. If we accept the theory that the treasurer is only chargeable with the amounts he has collected, instead of what he should have collected, we place it in his power to disarrange the whole system of township government. As he is only to state his accounts annually, and if he is only to account for what he has received, how are the township authorities to know who have or have not paid, and upon whom shall they confer the right to collect the uncollected balances? The law devolves the duty and right to collect only upon a treasurer and his deputies; and thus, for two years, there would seem to be no power to do what the law assumes the treasurer shall do.

The condition of the bond is, first, that "he shall faithfully perform his duties"—that is, collect the taxes; and second, "to account for the sums received." If he can not collect, the board can exonerate him. But it is his duty to show an inability. The duplicate is an order in his favor for so much money due the township, and

he is at once chargeable with the amount. It would be an anomalous condition of affairs to place the sole power of collecting in an officer, and then only charge him with what he has collected, without his showing why he has not performed his whole duty. It is no answer to say that he can be sued on his bond. The tax laws provide otherwise. His liability must first be ascertained before proceedings can be had on the bond. Stress is laid upon the fact that the township treasurer's bond is identical with that required from a county treasurer; but to our mind this has no significance. A county treasurer is not a collector of taxes; he receives the money from the collectors. In each case the law requires the officer to do his duty, and in this case the law requires the treasurer to collect the tax; and unless he does so, or shows good cause, he becomes responsible. Any other conclusion would require the township on a settlement to show an ability to collect, thus imposing a burden which might make it impossible, the books for at least two years being in possession of the treasurer.

As the act vests in the treasurer all powers conferred by existing laws on township tax collectors, he is also charged with corresponding duties, which are to faithfully perform his duty to collect, or to explain why he has not been able so to do. The law thus imposing a duty, he becomes liable for its non-performance, and the first step to fix his liability is a settlement of his accounts. The argument that this liability is to be ascertained by a suit on the bond is not tenable. "Until the account of township tax-collectors are settled by the township auditors and an amount ascertained by such auditors to be due by such collectors, a proceeding at law upon the official bond is premature and unauthorized": Swatara Township School District's Appeal, 1 Sup. Ct., 502.

The act of 1899 does not provide a method for the collecting of taxes essentially different from that in other townships.

"Where there are several acts on the same subject they are to be taken together, and as interpreting and enforcing each other: 2 East., 6; Har. Dig., 2054. Statutes on the same subject are to be construed together: Lofft's Rep., 398. The general system of legislation upon the subject matter may be taken into view to aid the construction of any one statute relating to the same subject: 1 Pickens, 254": Neald's Road, 1 Pa., 353.

"Acts in *pari materia* must be construed together": Appeal of

P., A. & M. Passenger Railway Co., 1 Penny, 449. Construing the various acts on the subject as a harmonious system, we are of the opinion that the appeal must be dismissed.

And now, February 23, 1904, the appeal is dismissed at costs of appellants.

Orphans Court of Montgomery County.

Estate of Michael A. Day, Deceased.

Where part of a trust fund consists of shares of stock upon which scrip dividends are declared, convertible in stock or payable in cash at the option of the share-holder, such dividends are income as between life-tenant and remainderman.

New shares issued to stock-holders under a stock allotment, or the proceeds of the sale of the privilege to subscribe to such issue, are not profits or income belonging to the life-tenant, but become part of the corpus of the trust and belong to the remainderman.

Where it is shown that the right or privilege to subscribe for such issue of new stock has a market value, and a trustee share-holder entitled to subscribe neglects to sell his right, whereby the estate suffers loss, he is liable to the remainderman for the highest price the allotment right could have been sold for in the market.

Adjudication of the final account in said estate.

Charles Hunsicker, Esq., for accountant.

Joseph W. Hunsicker, Esq., for the residuary legatees and exceptants.

Opinion of the court by Solly, P. J., March 7, 1904.

The last will and testament of Michael A. Day provided, *inter alia*, as follows:

"In view of making my beloved wife comfortable in this life, I give and bequeath to Emelia A. Day five hundred dollars ($500) absolutely. And also I give and bequeath to her, Emelia A. Day, to which she consents, in lieu of dower or thirds, during her natural life, eight thousand dollars ($8,000) of lawful money, to be put out in good and safe securities, the interest of which to be hers while she lives, and after her death to be equally divided between my children then living, or their issue if deceased."

The widow elected to take certain securities for the eight thou-

sand dollars bequeathed to her for life, amongst which was ninety-nine shares of Pennsylvania Railroad Company at the appraised value of $5,717.25. The widow died July 26, 1903, intestate. Her administrator filed an account in the trust estate, in which she is charged with the stocks and cash amounting to $8,000.

The five residuary legatees, those entitled by way of remainder to the trust estate on the death of the widow, filed certain exceptions to the account, seeking to surcharge the accountant with four shares of the stock of the Pennsylvania Railroad Company received by her as trustee, and with $151.50, the amount of a scrip dividend on the stock of the same company held by the estate and also received by her, which said four shares and said cash they claim are a part of the corpus of the trust estate. It was also shown that the railroad company has made certain stock and bond allotments which entitled this estate as a share-holder of the company to the privilege of subscribing for additional stock, either at par or at $60 per share, which the widow as trustee failed to take advantage of for the benefit of the estate by at least realizing upon the sale of the privileges. And the additional claim was made that the accountant should be surcharged with the loss to the estate by reason of her negligence to protect the estate in this regard.

OPINION.

Two questions of law arise under the facts of this case.

First. Where a trust is created by will for one for life with remainder over, and a portion of the estate in the hands of the trustee consists of shares of stock of a company, upon which scrip dividends are declared, which by their terms are payable in cash or convertible into stock at the option of the shareholder, and the trustee at one time takes the cash and at other times takes stock, is such cash and stock, as between the life-tenant and the remaindermen, income or capital?

Second. Where the company makes a stock allotment entitling each share-holder to subscribe for a certain number of shares based upon his holding, he paying a stipulated price for them, and the right to the allotment has a market value, if one of the shareholders is the trustee of an estate who fails to take the allotment, or to sell the right to the same in the market, but suffers it to lapse, is

he liable to the estate for what could have been realized by sale of the right?

Mr. Steele, dividend clerk of the Pennsylvania Rsilroad Company, explained that a scrip dividend is a certificate issued by the company as dividend, which can be used for conversion into stock or redeemed by the company in cash. When a company declares such kind of dividend, the presumption of law is that the directors of the company set apart a certain amount of money from the profits or earnings for division among the share holders, who are given the option either to take the cash or to take stock to the amount of their respective shares of said profits; and if the stock is taken, the company retains the money and issues the stock. The share-holder can elect to take either cash or stock; but, no matter which he chooses, he receives a share of the profits of the company which the directors have put aside from its assets.

This definition of "dividend" is given in Weimer on Pennsylvania Corporation Law, page 342, approved in Rose vs. Barclay, 191 Pa., 594, and which the court says "is amply supported by Com. vs. Railroad Co., 29 Pa., 370; Com. vs. Railway Co., 74 Pa., 89; and City of Allegheny vs. Railway Co., 179 Pa., 421": "A dividend is that portion of the profits and surplus funds of a corporation which has actually been set apart by a valid resolution of the board of directors, or by the share-holders at a corporate meeting, for distribution among the stock-holders according to their respective interests, in such a sense as to become segregated from the property of the corporation to become the property of the share-holders distributively. It is a matter of no difference whether the dividend is declared in stock or paid in cash and thereafter converted into stock by the share-holders; in either event it is a distribution of the surplus profits of the corporation."

This definition is simple and comprehensive. It will be noticed that the elements of a dividend are the setting apart of a portion of the profits and then distribution among share-holders. Whether paid in stock or in scrip, convertible into stock or cash, is immaterial so long as it represents surplus earnings. And being profits or earnings, whether the share-holder receives his portion in stock or cash, it is income and belongs to the life-tenant of the stock and not to the remainderman. But where there is a right given the shareholders to subscribe to a new issue of stock of a company, the stock

so subscribed and issued, or what may be realized by sale of the share-holder's privilege to subscribe, is not profits, earnings or income, because the new stock is a pure increase of capital, bringing in new stock-holders to share in the property of the company, thus lessening the intrinsic value of each share of stock. In such case the new stock issued to the old holder, or the proceeds of the privilege to subscribe, sold to another, belongs to the remainderman as part of the corpus or principal of the estate.

In Wright's Estate, 9 D. R., 447, Judge Penrose in a clear way draws the distinction between what is income and what is principal as between life-tenant and remainderman, in cases of dividends and stock allotments. He says: "A stock dividend implies that cash earnings which otherwise would have been paid to stockholders have been withheld for the purpose of improving or adding to capital, and of course, representing earnings, the dividends thus declared are income, going to the tenant for life, and not profits belonging to the remainderman. On the other hand, if money has not been earned, but, being required to improve or preserve capital, is raised by the issue and sale of new stock, which is represented by just what is paid for it, as the effect is to let in a new set of stockholders, who would share with the old ones if the company went into liquidation, such stock or the price paid for the privilege of subscribing for it can not of course be income." When the directors of the railroad company declared dividends of cash and scrip, the latter convertible into cash or stock, we must assume they first set apart so much cash representing certain earnings, and the shareholder received the cash part of the dividend and a scrip certificate for the other part which entitled him to demand from the company either cash or stock to that amount; if he demanded stock, the company issued the shares to him and turned back the cash to its capital account. The four shares of stock issued to Mrs. Day and the $151.50 received by her by conversion of the scrip dividends represented, therefore, so much of the earnings of the company to which the shares held by the estate were entitled, and belong to her as life-tenant. The dividends are income, not capital. It was so held in Appeal of Philadelphia Trust and Safe Deposit Company, 16 Atl., 734, where scrip certificates representing profits earned were issued to the stockholders of a company, convertible into cash, when

authority to increase the capital stock should be obtained. This decision followed the rule laid down in Earp's Appeal, 28 Pa., 368.

"Where a corporation, having actually made profits, proceeds to distribute such profits among the stock-holders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity, which disregards form and grasps the substance, would award the thing distributed, whether stock or money, to whomsoever was entitled to the profits": Moss's Appeal, 83 Pa., 264.

Is she chargeable with the price or premium which she could have realized by the sale of the stock and bond allotments? That the estate was entitled to subscribe for a number of shares under each allotment is certain, and it is equally certain there was a market for the sale and purchase of the privilege to subscribe. Had she sold these several privileges, it is shown the estate would have realized from $496.66, the lowest quotation prices, to $969.16, the highest, upon the number of shares based on 99, to which the estate was entitled. If she is so chargeable, it must be because the money which would have been realized would be capital and not income, as between the children as remaindermen and herself as life-tenant; and also for the reason she was guilty of negligence in not selling and realizing for the benefit of the estate.

That the money which she could have obtained for these options or allotments would be capital is clear: Moss's Appeal, 83 Pa., 264; Biddle's Appeal, 99 Pa., 278; Eisner's Estate, 175 Pa., 143; Cook on the Law of Stock and Stock-Holders, Sec. 559.

In Eisner's Appeal the decree was affirmed upon the opinion of the lower court, in which it is said: "An increase of capital by the issue of new stock to persons paying for its par value, implies the very reverse of profits earned. The fact that the privilege of subscribing for it is given to existing stock-holders, and that it may be sold by them at a premium, is far from proving that the premium is to be regarded as income, the payment or withdrawal of which leaves the original capital unimpaired." And in Cook on the Law of Stock, &c., the principle is thus stated, and a number of cases cited in support: "The right to subscribe for new shares at par on an increase of the capital stock, which is an incident of the ownership of the stock, does not belong, as a privilege, to the life-tenant, but such an increase must be treated as capital and be added to the

trust fund for the benefit of the remainderman. This is equally the rule whether the trustee subscribes for the new stock for the benefit of the trust, or sells the right to subscribe for a valuable consideration; in either event the increase goes to the corpus."

We think it was the duty of Mrs. Day as trustee to realize on the privileges to subscribe to the stock and bond allotments by their sale in the market. She was bound to protect the estate; and when no risk was assumed, and the estate would not have been put in jeopardy by such sale and realization, but on the other hand an increase of the estate was certain, the remaindermen, or those entitled to the stock at her death, ought not to suffer by her neglect. Her omission to sell the privileges was unintentional, no doubt, in each instance; but, nevertheless, she negligently omitted to protect the estate and those interested. The law requires trustees to use common skill, common prudence and common caution in the management of estates in their charge. The measure of diligence and care required is precisely that which a man of ordinary prudence would practice in the care of his own estate: Fahnestock's Appeal, 104 Pa., 46. A trustee is held responsible for supine negligence or for willful default. This is well settled law, as was said in Chambersburg Saving Fund's Appeal, 76 Pa., 203, and reaffirmed in Bartol's Estate, 182 Pa., 407.

When, therefore, Mrs. Day neglected to realize upon the privileges given the estate, as a share-holder of the Pennsylvania Railroad Company, to subscribe for the new issue of stock by selling the same at the prevailing market prices, she did not do that which a person of ordinary and common prudence would have done, especially, as we have before said, where it clearly appears neither the estste nor herself would have possibly suffered by so doing. By her negligence the estate suffered a loss; and, in our judgment, she is liable to the remainderman, and for the amount based upon the highest market prices the allotment privileges could have been sold for in the market. This amount we find to be $969.16, according to the prices agreed upon by counsel.

The accountant asks to be allowed commissions of $400, being five per cent. on $8,000, the corpus of the trust, to which objection is made by the remaindermen, who say commissions, if any, should be paid by the estate of Mrs. Day. It seems no compensation was charged by the executors of the estate when settlement and distri-

bution were made. Presumably their claim to them was waived; at least the right was not reserved in future settlement of the trust, as far as appears. Had the executors deducted their commissions in their account, the balance for distribution would have been less and the distributive shares proportionately decreased. It is rather narrow now upon the final settlement and distribution of the trust estate to object to the allowance of at least a reasonable compensation to the administrator of the deceased trustee, for the services rendered. In equity and good conscience he is entitled to be paid, but not the amount claimed. The railroad stock is intact, and is simply to be transferred in kind to the remaindermen in equal shares; and what is left over, accounted for in distribution as so much cash. The bank stock has been converted into money, and the navigation stock considered as converted. We think an allowance of $150 is fair, and will reasonably compensate the accountant for care, responsibility and services rendered and to be rendered to final distribution, and that amount is awarded.

Court of Common Pleas of Montgomery County.

EDWARD KOLB VS. LONDON ASSURANCE CORPORATION.

Where goods were insured in a specified building, and were afterwards removed to another, where they were destroyed by fire, a statement which alleges that the agent, after being notified before the fire of the removal, inadvertently neglected to endorse on an "amended form" to said policy a change in the description of the building, is defective in not alleging any duty, obligation or promise to so transfer the policy.

In the absence of an averment of duty, promise or acquiescence, the mere demand to have the removal noted was not sufficient to impose liability.

DEMURRER. No. 49, October T., 1901.

John Faber Miller, Esq., for plaintiff.

Evans, Holland & Detta, Esqs., for defendant.

Opinion of the court by WEAND, J., March 7, 1904.

On June 27, 1898, the plaintiff's goods, contained within a stone, slate-roofed building, were insured against fire in the defendant com-

pany. On or about January 14, 1899, without previous permission or consent of the insurance company, the goods were removed to another building located on the same premises. Plaintiff then sent his policy to defendant's agent, giving him notice of the removal of the goods and requesting him to note or endorse it on the policy. The said agent "then and there attached noted or endorsed an 'amended form' to said policy, but inadvertently neglected when doing so to change the description of the building in which said insured property was then and to be thereafter contained; and it was not until after the occurrence of the fire hereinafter mentioned that the plaintiff discovered said oversight or omission from the said 'amended form' or endorsement."

The goods were subsequently destroyed by fire.

The defendant demurs to the statement as showing no valid agreement or obligation to insure the property in the building in which it was destroyed.

We are of opinion that this ground of demurrer must be sustained.

The statement is defective in that it does not allege any duty, obligation or promise of the agent to transfer the insurance to another building, or any acquiescence on his part in such removal. There could be no negligence on his part unless there was a duty to be performed. In the absence of an averment of duty, promise or acquiescence, the mere demand of plaintiff to have the removal noted was not sufficient to impose liability.

There is no averment that the "amended form" was intended to cover or allow the removal of the goods. An inspection of the policy shows that it was amended so as to include cows.

And now, March 7, 1904, the first ground of demurrer is sustained with leave for plaintiff to amend his statement within thirty days.

GEORGE AMBERG, JR., VS. ELLEN FITZPATRICK.

Under the law as it stood prior to the act of June 4, 1901, P. L. 431, it was not necessary to annex the written contract to the mechanic's lien to support the lien.

It is competent to show by parol that under a new and distinct agreement, subsequent to the written contract, the work was to be performed in some particulars differing from the manner described in the original agreement.

Under an issue whether there was substantial compliance with the agreement, it is competent to give evidence showing that the departure was not willful and related only to minor particulars.

If a party acting honestly and with a *bona fide* intention of fulfilling his contract, performs it substantially, he is entitled to a fair compensation according to the contract, the other party receiving credit for whatever loss or damage he may have sustained by the slight deviations in the work. The contractor is not responsible for changes or omissions made with the consent of the owner.

MOTION and reasons for a new trial. No 87, June T., 1903.

John Faber Miller, Esq. for plaintiff.

N. D. Tyson, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., March 7, 1904.

The reasons for a new trial are quite numerous. Answers to the following inquiries, in our opinion, will meet all the objections raised by the defendant. First, was it necessary that the plaintiff should attach the written contract to his lien to support a judgment on the scire facias? Secondly, may the parties to a written building contract make subsequent changes verbally whereby one character of the work is substituted for another? Thirdly, was there sufficient evidence, to be submitted to the jury, from which it could find a substantial compliance with the contract?

The contract was made in April, 1901, and work commenced immediately. The lien is therefore governed by the laws as they stood prior to the act of June 4, 1901, P. L. 431.

The lien sets forth that the work was done and the materials were furnished by the plaintiff, "under and in pursuance and fulfillment of a contract between the said George Amberg, Junior, and the said Ellen Fitzpatrick, for the erection and construction of said building, which said contract was made or entered into on or about April 9, 1901, and provided, *inter alia*, for the erection and construction of said building by the said George Amberg, Junior, for the agreed upon or stipulated price of twenty-five hundred and seventy-five dollars ($2,575)."

The contract was in writing and was not annexed to the lien. The lien does not state whether the agreement was verbal or was in writing; it speaks of the erection and construction in pursuance of "a contract." So far as the terms of the agreement are given in the lien they are the same as those contained in the written contract.

The affidavit of defence calls attention to the fact that the contract was in writing. No application was made to the court for relief because the written contract was not annexed to the lien. The defendant pleaded *nunquam indebitatus* and went to trial. This plea put at issue whatever facts it was incumbent upon the plaintiff to prove in order to support the lien: Pittsburg vs. Walter, 69 Pa., 365. This plaintiff undertook to do, and as soon as the written contract was called for it was produced and the evidence was confined to it. The language in the lien describes a special contract—that is, a special contract for an entire construction. In O'Brien vs. Logan, 9 Pa., 97, and Hahn's Appeal, 39 Pa., 409, it was held that the liens were good without even a reference to a special contract. The defendant was not prejudiced; he averred the written contract, and the plaintiff was compelled to meet the requirements of that contract. The whole matter was adjudicated at the trial as if the plaintiff had fully set out his special contract: O'Brien vs. Logan, *supra*. We called the attention of the jury again and again to the written contract, and that the plaintiff must be held to its terms.

We held that it was competent for the plaintiff to show by parol that under a new and distinct agreement subsequent to the written contract the work was to be performed in some particulars differing from the manner described in the original agreement. In this there was no error; the rule that extrinsic evidence is not admissible to contradict or alter the written instrument is not thereby infringed: McCauley vs. Keller, 130 Pa., 53. The same rule is recognized in Malone vs. Dougherty, 79 Pa., 53, and Collins vs. Barnes, 83 Pa., 15.

It is claimed that we admitted conversations prior to the execution of the original contract to establish changes in the written contract. This is a mistake. We made no such rulings, but distinctly told the jury such prior conversations could not modify the subsequent written contract. The stairway was not built in strict compliance with the specifications. The contractor insisted that it was constructed according to the defendant's wish. We held that the prior conversations about the stairway could not change the con-

tract; that the contractor was required to follow the specifications. The question then arose whether there was a willful, intentional departure as to the stairway by the contractor. He claimed that he honestly constructed the work as he believed she wanted it done. Where there is a minor change or departure from the contract, and the question of substantial compliance is raised, we conceive there is a difference whether the change is a willful departure or an honest, *bona fide* intent to meet the desire of the owner. An honest mistake in a material matter will not excuse, and a willful, intentional or negligent departure may defeat recovery even where the changes are not very serious.

This principle is recognized in Miller vs. Phillips, 31 Pa., 222: "If a party acting honestly and with a *bona fide* intention of fulfilling his contract performs it substantially, but fails in some comparatively slight particulars, he is entitled to a fair compensation according to the contract, the other party receiving credit for whatever loss or damage he may have sustained by these deviations."

After a careful examination of the evidence we are satisfied that it would have been error to withdraw the case from the jury and to direct a verdict in favor of the defendant on the ground that there was no substantial performance of the contract.

True, there were instances in which the contractor did not strictly follow the written plans and specifications. There was evidence, however, as to nearly every variation, that the change was made with the approval of the defendant or at her request. "A contractor must lose his labor if he does not expend it in the manner agreed upon. He is, however, not responsible for changes or omissions made with the consent of the owner": Bryant vs. Stilwell, 24 Pa., 318.

As to these changes it was the province of the jury to say whether they would believe the plaintiff and his foreman or the defendant and her son, who was her agent. This branch of the case was carefully submitted to the jury, and we think with due fairness to the defendant. The contractor failed to put white lead into the joints of the boards on the porch floor. He says the plans were not in his possession at the time, and that the matter was overlooked. He says complaint was made that he then agreed to paint the entire floor without charge, and that this substitute was accepted as satisfactory by the defendant.

The ceilings lacked a few inches of the height given in the plans. It is admitted that the external measurements of the house were observed by the contractor, and that the elevations and the height of the house conform to the plans. The plaintiff says he is not responsible if the internal measurements do not hold out. Was he required to build a house of larger external dimensions than those given in the plans? Or was he to assume that the internal measurements would not hold out if he gave the house the size and height designated in the plans?

The rooms were not of the size noted in the specifications. If the plaintiff's foreman is to be believed, then Mrs. Fitzpatrick enlarged the kitchen while the work was going on. This would necessarily curtail the other rooms.

The joists in the first and second floors were to be sixteen inches apart. The plaintiff says he so laid them. The defendant and her witnesses say they are eighteen inches apart. The plaintiff admits that he did not place the joists on the third floor as specified. He claims that it was necessary to place them at the distance of two feet apart to conform to the rafters of the roof, otherwise there was no means of fastening the roof and making a good job. The necessity for the wider spacing is denied by the defendant and her witnesses.

Complaint is made as to the character of the doors and stairway. We think this was an honest mistake on the part of the contractor. There was no saving of time, labor or money, so far as the evidence indicates, and there was no purpose in making the change unless we find with the contractor that his intent was to do the work as he understood the defendant wanted it done. We think the jury could well conclude that this was a minor particular for which compensation could be allowed if the defendant was entitled to a deduction.

The defendant lived within two hundred yards of the new building during the whole time the house was in construction. She visited the place very frequently. Her son, who was her agent, also watched the construction from time to time. They observed the doors, stairway, bath-room, and the other matters of which they now complain. The contractor's attention was called to these changes or some of them as the work was going on. When these matters were

discussed it is not shown that in a single instance the mother or son demanded the tearing out of any work. There was no intimation that the building would not be accepted as then constructed. When the change in the bath-room was spoken of the contractor claimed that it was done to save the cutting of a joist which would have weakened the construction. The son says, "I asked, 'Why did you change the bath-room? My mother will be displeased. We want a good finish and appearance of the place inside.'" This is not the language of a man who will not pay for a house until some change is made.

That there was no intent to raise the objections that are now raised, even as late as one month before the defendant took possession, is shown by her letter of August 14, 1901. She asks the contractor to finish up the house and bring the keys to her. The only matter to which she calls his attention is the water in the cellar.

The plaintiff says there was no fault found with his work while the construction was carried on, save as to the porch floor and inside painting. The porch floor was painted and the inside painting was done a second time. He claims the defendant was entirely satisfied with the work after these corrections were made.

No doubt some of the discrepancies between the constructed house and the plans and specifications are due to the architect. The defendant purchased the plans from an architect in Minneapolis. They are intended for a city house and not for a country construction. Then, too, it was found that the house in some respects was not just what the defendant and contractor wanted. Changes were made in the specifications but not fully noted on the plans. This discrepancy was a source of annoyance when at the trial an effort was made to define the real issues between the parties. Ready-made plans and specifications prepared in a distant city are likely to give trouble.

The plaintiff admittedly supplied some extra labor and some materials. He could produce no written order for them, and withdrew his claim for extra work. The jury also made some deductions because of some minor defects in the work. The verdict was $912.80. If the whole claim with interest had been allowed it would have amounted to more than eleven hundred dollars. The defendant failed to itemize the costs of changes in some of the matters complained of. She gave through her expert witness an estimate of one

thousand dollars as the cost of remedying all the defects. This witness said it was necessary to tear out the entire inside of the house. If the jury found with the plaintiff that the size of the rooms and the height of the ceilings were due to changes ordered by the defendant or to causes for which the plaintiff was not responsible, then this expert's evidence was of no assistance to the jury. His aggregate estimate could not be separated if the jury found the tearing-out process was not chargeable to the plaintiff.

The evidence was for the jury. They found there was a substantial compliance with the contract. If they did not believe the defendant it may be due to the fact that she was contradicted by other witnesses. She certainly made a decided mistake when she gave to the jury the sum paid for alterations in the plumbing. We think the verdict is justified by the evidence. We are not convinced of any substantial error in our charge to the jury. We think the case was fairly submitted to them.

And now, March 7, 1904, the reasons for a new trial are dismissed and a new trial is refused.

CITY OF PHILADELPHIA VS. CLINTON RORER ET AL.

An act of Assembly authorizing the city of Philadelphia to supply water to the citizens of Montgomery county from a certain water company, and file a lien for water-pipe, does not authorize the city to supply water from any other source and assess the property-owners for cost of pipe.

The assessment in this case was made according to the foot front rule, and the property being rural the charge was held to be illegal.

MUNICIPAL claim. No. 91, October T., 1902.

John M. Patterson, Esq., for plaintiff.

Wm. F. Dannehower, Esq., lor defendants.

Opinion of the court by WEAND, J., March 7, 1904.

This case was tried before the court without the intervention of a jury.

HISTORY OF THE CASE.

The lien was filed to secure an assessment for the cost of laying of water-pipe in front of the defendants' properties in Springfield

township, Montgomery county, under the act of April 10, 1873, P. L. 636.

By said act the city of Philadelphia, having purchased the premises, water-pipe, etc., lately belonging to the Chestnut Hill Water Company, was authorized to furnish water from said water-works to the residents of Springfield township, Montgomery county, with the right to make assessments of taxes or charges therefor, the filing of claims for the same, the lien of claims, etc., which the said city had or may hereafter have in the county of Philadelphia.

The objection to the claim is that the assessment was made by the foot front rule, and that the water is not furnished from Chestnut Hill Water Company's plant but from the river Schuylkill.

FINDINGS OF FACT.

1. The lien shows that the assessment was made according to the foot front rule.

2. The evidence shows that the pipe was not laid or is not used to supply water from the Chestnut Hill Water Company as contemplated and authorized by the act of Assembly which confers authority on the city to supply water to the residents of Springfield township.

3. The entire property in front of which the pipes are laid in Springfield township is rural property.

CONCLUSIONS OF LAW.

1. That the assessment according to foot front rule is illegal.

2. That the city of Philadelphia had no authority to levy an assessment or tax except for water to be supplied from the Chestnut Hill Water Company.

3. That the verdict must be for the defendant.

ARGUMENT.

The evidence shows that the property in front of which the pipes were laid is rural or country property. It is not closely built up, much of it being used for farming, florist or other purposes entirely inconsistent with the idea of a town, village or city life. There is no system of paved streets or curbing, and much of the ground is occupied by woods. We can not separate the defendants' properties from the rest, but must treat it as a whole. In the language of one

witness, "The property is strictly country. One of these properties I have described is one hundred or two acres. The ground is used for farming."

The occupation of most of the people living there on Willow Grove avenue is described thus: "They follow different business—florists, farmers, truckers." "They follow country pursuits." "Some reside there and have their business in the city."

Mr. Whitby, first assistant to the chief in the department of the Bureau of Water of the city of Philadelphia, testified that he was "acquainted with the character of the section through which this pipe is laid"; and, "I should say it was rural property. My judgment would be that it is strictly rural."

This brings the case within the rulings that "a municipal corporation has no power to charge rural lands with an assessment for water-pipe, calculated on their frontage, at a certain rate per foot": City of Philadelphia vs. Wetherill, 13 W. N. C., 10; Scranton vs. Coal Co., 105 Pa., 445; McKeesport vs. Soles, 165 Pa., 628; Seely vs. Pittsburg, 82 Pa., 360.

The city of Philadelphia could exercise no power to supply water to residents in Montgomery county and file liens therefor, unless expressly authorized by act of Assembly: Pittsburg vs. Brace, 158 Pa., 174. Such permission and authority was granted by the act of April 10, 1873, P. L. 636.

This act defines its purpose and the extent of the authority granted. The preamble reads as follows:

"Whereas, The city of Philadelphia has recently purchased the premises, water-pipes and other appurtenances lately belonging to the Chestnut Hill Water Company; and,

"Whereas, The said company has furnished water to residents of the township of Springfield, in the county of Montgomery, which residents would be greatly inconvenienced if they should now be deprived of the use of said water; therefore,

"Sec. 1. Be it enacted, etc., That the said city of Philadelphia is hereby authorized to furnish water from the said water-works, lately belonging to the said Chestnut Hill Water Company, to any of the residents of the said township of Springfield, in the county of Montgomery," etc.

The authority is thus confined to supplying water only from the Chestnut Hill Water Company.

The evidence shows that the city is not supplying water from said Chestnut Hill Water Company, but from the Roxborough station on the Schuylkill river. If, under this act, it can supply water from the Schuylkill, it can also from any place other than that for which the act was passed. Whatever rights it has in Montgomery county must be found in said act, and that only gives authority for one defined and special purpose—i e., to supply water from the Chestnut Hill Water Company. This plant is not used to supply water to any place or person, and therefore not to the persons whose properties are sought to be charged by this lien.

We are not called upon to pass on the question as to whether there is any liability, in a common law action, upon the part of those who requested the pipes to be laid.

We therefore find a verdict for defendants.

And now, March 7, 1904, the court directs a verdict for defendants with costs, and directs judgment to be entered thereon unless exceptions are filed according to law.

IN EQUITY.

JOHN J. NOCTON VS. PENNSYLVANIA RAILROAD COMPANY AND JOHN T. DYER.

Where a borough vacates a street under the act of May 16, 1891, P. L. 75, an abutting owner is not damaged in his property, and under the law he has no tangible interest which gives him a right of complaint. Much less is there a right to damages where the land does not abut on the part of the street vacated.

The act of 1891 gives no appeal to the Court of Common Pleas where a municipality vacates a street.

Municipal ordinances are not required to conform to the constitutional provision that "no bill shall be passed containing more than one subject, which shall be clearly expressed in the title."

There is no necessity to wait sixty days before a vacated alley may be closed. The time limit was given for cases in which an appeal is allowed. Where there can be no appeal there is no necessity for time to enter an appeal.

FINAL HEARING before the court. No. 1, December T., 1903.

Henry Freedley, Esq., for plaintiff.

N. H. Larzelere, Esq., for defendants.

Opinion of the court by SWARTZ, P. J., March 28, 1904.

Nocton vs. Penna. R. R. Co. et al.

By an ordinance passed December 15, 1903, the borough of Norristown vacated Strawberry alley for the distance of eighty-one feet and one inch southwestwardly from Lafayette street. The defendant railroad company, through its contractor, John T. Dyer, constructed a wall across the said alley at the western end of the vacated part of the alley, and thereby closed the alley for said distance of eighty-one feet one inch.

The plaintiff is the owner of the property at the east corner of Washington street and Strawberry alley. He claims that the closing of the alley for the distance named, and at the point designated, destroys his property and business by preventing access over and along Strawberry alley. He contends further that the action of the town council gives no warrant or authority for the closing of the alley. His bill was filed before the obstruction was fully completed, to restrain the defendant company from further work on said wall. Upon a preliminary hearing the injunction prayed for was refused.

FINDINGS OF FACTS.

1. Strawberry alley, a street eighteen feet wide, ran from Main street to Washington street, being a distance of two squares. The defendant railroad is located on Lafayette street. This street runs parallel with Main and Washington streets, about midway between them. The railroad on Lafayette street crosses Strawberry alley at grade.

2. The railroad company in the construction of a new depot on Lafayette street near the intersection of Strawberry alley, desired to eliminate the grade crossing at the said alley as well as the grade crossing at Shaving alley. The latter alley runs parallel to Strawberry alley, and crosses the railroad about one hundred and seventy-five feet east of the Strawberry alley crossing.

3. The railroad company presented its petition to the borough council on December 1, 1903, asking for the vacation of Shaving alley from Lafayette street westwardly for the distance of forty-two feet eleven inches, and for the vacation of Strawberry alley westwardly for the distance of eighty-one feet one inch. In consideration of such vacations the company offered to construct and provide for public use two substitute alleys running east and west between Swede and DeKalb streets parallel with Lafayette street. These

substitute alleys were to connect with each other and with the part of Strawberry alley not vacated.

4. The borough council passed an ordinance on the 15th day of December, 1903, vacating the parts of the two alleys as prayed for. The second section of the ordinance provided as follows: "In consideration of the aforesaid vacation of parts of Shaving alley and Strawberry alley the Pennsylvania Railroad Company shall at once construct and provide for public use two substitute alleys." The substitute alleys described in the ordinance are the same which the company in its petition to the borough had offered to construct. The company on the 17th day of December, 1903, accepted the ordinance with the provisions therein contained.

5. The ordinance received the approval of the burgess on the day of its passage. The ordinance was promulgated by posted hand-bills and by advertisement in the three daily newspapers of Norristown. The hand-bills were not posted before the passage of the ordinance, and the newspaper publications followed its final passage.

6. The ordinance was not introduced thirty days before its passage, nor was it advertised three weeks before its final passage.

7. The plaintiff is the owner of a property situate at the east corner of Washington street and Strawberry alley. The property fronts sixty-two feet on Washington street and extends back northeastwardly along the southeast side of Strawberry alley ninety-one feet to a ten feet wide alley. No part of the plaintiff's property abuts on the vacated portion of Strawberry alley. The vacation does not even extend to the ten feet alley in the rear, but stops ten feet north of this rear alley.

8. The plaintiff in the conduct of his business used Strawberry alley in hauling coal and feed from his yard. It was his best passageway because of the location of the Philadelphia and Reading railway on the bed of Washington street. If he uses the substituted alleys he will have a safer outlet and one equally convenient except as to some of his customers.

9. The weight of the evidence does not establish that the ten feet alley in the rear of his property is a public alley.

10. The Pennsylvania Railroad Company is the owner of all the land abutting on both sides of the alleys so far as the same were vacated by the ordinance of December 15, 1903.

11. The company constructed the substituted alleys, and they are open for public use so far as the railroad company has any control over them. The company gave the land to the full extent specified in the ordinance. The vacated parts of the alleys are now closed; but the work was not fully completed when the plaintiff's bill was filed.

12. The title of the ordinance does not clearly give notice of the subject matter of the enactment.

13. The ten feet alley in the rear of plaintiff's property was not in any way interfered with or disturbed, either by the action of the borough council or by an act of the defendant company. All the company did was to add ten feet of its own ground to the narrow existing passageway. If the plaintiff's ten feet in the rear of his property constitute a private alley, no act of the borough or the railroad company made it a public alley.

14. The ordinance was passed in pursuance of the act of May 16, 1891, P. L. 75, under the provision that the borough may act where a majority in interest and number of abutting land-owners on the line of the improvement present their petition to town council.

CONCLUSIONS OF LAW.

1. The petition of the railroad company, the owner of the land abutting on the parts of the alleys vacated, gave authority to the borough to pass the vacating ordinance.

2. Where a borough vacates a street, even an abutting owner is not damaged in his property; and under the law he has no tangible interest which gives him a right of complaint.

3. There is no appeal to the courts from action of municipal legislatures unless such appeal is allowed by statute. The act of May 16, 1891, P. L. 75, and its supplements give no appeal except as to the question whether a majority of land-owners signed the application to the borough. The court, therefore, has no authority to declare the ordinance invalid because of insufficient notice before its passage. If the question can be raised it must be done by some person having an interest in the subject matter of the ordinance. The plaintiff has no standing or interest to raise the question.

4. Municipal ordinances are not required to conform to the constitutional provision that "no bill shall be passed containing more than one subject, which shall be clearly expressed in the title."

5. The ordinance of December 15, 1903, is valid, and justified defendant company in closing the vacated part of Strawberry alley.

6. It was not necessary to wait sixty days before the alley could be closed. There was no appeal under this vacating ordinance, and therefore no necessity to await the expiration of the time limit given for an appeal where one can be entered.

7. The plaintiff's bill must be dismissed at his costs.

DISCUSSION.

That the railroad company is the owner of the land on both sides of the alleys so far as the vacation extends can not be denied. The borough did not lay out any new alley, nor did it ordain that any private alley should hereafter be treated as a public alley. Referring to a private alley as an existing public alley did not change its character. Especially must this be true where the ordinance fails to show any intent to establish a public alley. A mere mistake in designating it a public alley did not of itself give it that character. If the plaintiff had a private alley in the rear of his property, it remains intact, and no one can disturb him in the use of it.

As no property of the plaintiff was taken, injured or destroyed, it follows that he has no standing or interest to complain of the ordinance in question. The late case of the Daughters of the Revolution vs. Schenley, 204 Pa., 572, is a complete answer to his bill. The tenth section of the act of May 16, 1891, P. L. 75, gives no appeal from ordinances vacating streets. "Under the existing law an abutting owner can not be damaged in his property by the vacation of a street or highway; he has no tangible interest which gives him a right of complaint." It requires a statute to confer the right of damages for the vacation of a street. The act of 1891 did not adopt a new rule; it accepted the law as it stood. See also McGee's Appeal, 114 Pa., 470. In the city of Philadelphia the act of April 21, 1858, P. L. 386, conferred the right to damages in cases of vacation, and it was because of that act that damages were allowed in Melon Street, 182 Pa., 397.

If the plaintiff has no tangible interest in the matter, why should he be heard in an attack upon the ordinance? What necessity was there for notice to him before the ordinance was finally passed? If the plaintiff has an interest, which we do not concede, the court can not give him a redress for his grievance. The court can not inter-

fere with municipal legislation unless some statutory authority is pointed out giving the right: Diamond Street, 196 Pa., 254.

The act of May 22, 1883, P. L. 39, gives to any person aggrieved in consequence of an ordinance the right to appeal to the Court of Quarter Sessions. Even if this act applies to boroughs created under a special charter, the plaintiff can not secure the relief by a bill in equity; he must follow the statutory remedy. He can not raise the question by a collateral attack: Beechwood Avenue, 194 Pa., 86.

Upon the question of notice preceding the final passage of the ordinance the plaintiff is confronted with the rule that these provisions for notice are directory, and failure to comply with them does not invalidate the ordinance: White vs. Borough of McKeesport, 101 Pa., 394; Commonwealth vs. Beaver Borough, 171 Pa., 542; Pennsylvania Railroad Co. vs. Greensburg Railroad Co., 176 Pa., 559. This rule, we think, is enforced where an effort is made to defeat the ordinance through a collateral attack made against its validity on the ground of want of notice.

Plaintiff contends that the ordinance is invalid because its title is defective, and does not give notice of the subject matter embraced in the ordinance. When the case was before us on preliminary hearing we thought there was merit in this objection; but further investigation satisfies us that the point is not well taken.

As already shown, the case of Norristown vs. Norristown Passenger Railway, 148 Pa., 87, does not sustain the plaintiff's contention. The real issue in that case was whether a borough could by ordinance establish a new method for collecting debts or enact a lien law for the collection of money due the borough. Dillon on Municipal Corporations, Sec. 47, says: "The constitutional provision, however, that no bill shall contain more than one subject, which shall be clearly expressed in the title, is limited to state legislation and has no application to municipal ordinances." McQuillin on Municipal Ordinances, Section 141, states the rule as follows: "In the absence of such express provision the constitutional requirement in this respect does not apply to the passage of municipal ordinances, as ordinances are held not to be laws within its meaning." The express provision referred to in this section is a declaration in the Constitution that municipal charters shall provide that ordinances must contain but one subject, which shall be clearly expressed in

the title. The same rule was recognized in our own state in Corry vs. Corry Chair Co., 18 Pa. Superior Ct., 271. In that case the point was made that the ordinance was not in conformity with Section 3 of Article III of the Constitution of Pennsylvania. The court replied that "a city ordinance is not a law within the meaning of the section of the Constitution referred to." The same ruling was made in Yardley Borough, 22 Penna. County Ct. Rep., 179. That this was the accepted view taken of the matter is shown by the fact that it required an act of Assembly to bring cities of the third class within the constitutional limitation. See act of May 23, 1889, P. L. 277, Article IV, Sec. 2.

Complaint is made that Strawberry alley was closed before the substituted alleys were opened. At the preliminary hearing it appeared that these substituted ways were open. It was not shown that the plaintiff or any one else was prevented from using them.

The defendant company gave all the land demanded under the ordinance for the substituted alleys. If in any manner it failed to keep the agreement made with the borough, it remains with the latter to enforce the consideration demanded for the vacation.

Under the evidence before us we refuse to find that the alley in the rear of plaintiff's property, as it existed prior to the addition made to it by the railroad company, was a public alley. The public had the use of it, but it was established for the convenience of the abutting land-owners. The deed creating it designates it a private alley, and there is no evidence before us from which we can find an intent to dedicate it to public use: Ferdinando vs. Scranton, 190 Pa., 321; Weiss vs. Borough of South Bethlehem, 136 Pa., 294.

Further evidence, when the question is properly raised, may show an intent to dedicate to public use. As already shown, we fail to see how this question is material to the issue now before us. The borough was not bound to provide a public alley for plaintiff's benefit when it vacated the part of Strawberry alley, and the borough did not in any way interfere with the existing ten feet alley.

The vacation being valid under the ordinance, the defendant company was protected and justified in all that was done by its employees or under its direction.

And now, March 28, 1904, it is ordered that the prothonotary enter a decree *nisi* dismissing the bill of the plaintiff at his costs; and unless exceptions are filed as provided by the equity rules, he will enter a final decree as of course.

Appeal of John J. Nocton.

Where a street is vacated by ordinance of a borough council under the act of May 16, 1891, P. L. 75, upon petition of a majority of the owners of property abutting on the line of the improvement, an owner whose land does not abut on the part of the street vacated has no standing to appeal to the Court of Common Pleas to set aside the ordinance.

Appeal to set aside the ordinance of the borough of Norristown passed December 15, 1903. No. 19, March T., 1904.

Henry Freedley, Esq., for plaintiff.

N. H. Larzelere, Esq., for defendants.

Opinion of the court by Swartz, P. J., March 28, 1904.

The Pennsylvania Railroad Company presented its petition to the borough council of Norristown for the vacation of parts of certain alleys. The application asked for the vacation of Shaving alley from Lafayette street southwestwardly for the distance of forty-two feet eleven inches, and for the vacation of Strawberry alley from Lafayette street southwestwardly for the distance of eighty-one feet one inch. The petition so presented sets forth that the said railroad company is the owner of the real estate on both sides of the alleys abutting on the parts to be vacated. The application of the railroad company also sets out that it would construct and provide for public use two substitute alleys.

On December 15, 1903, the borough passed an ordinance vacating the parts of the alleys described in the petition of the railroad company. In the second section of the ordinance it was provided that "in consideration of the aforesaid vacation of Shaving alley and Strawberry alley the Pennsylvania Railroad Company shall at once construct and provide for public use two substitute alleys." The substituted alleys described in the ordinance were the same which the railroad company in its petition offered to construct and provide for public use. The railroad company accepted the ordinance under the provisions named in the second section. The parts of the alleys vacated were closed. The railroad company constructed the substitute alleys in accordance with the provisions of the ordinance.

The appellant, John J. Nocton, is the owner of a property situate at the east corner of Washington street and Strawberry alley. The property fronts sixty-two feet on Washington street and extends back along the southeast side of Strawberry alley ninety-one feet to

a ten feet wide alley in the rear. No part of Strawberry alley upon which the appellant's property abuts is vacated. The vacation does not even extend to the ten feet alley in the rear, but stops ten feet north of this rear alley.

The appeal was taken under the tenth section of the act of May 16, 1891, P. L. 75. The only ground of appeal recognized by this section relates to the inquiry whether the improvement was petitioned for by a majority in interest and number of the owners of property abutting on the line of the proposed improvement. The appellant does not base his appeal upon any other ground.

The improvement, so far as any action was taken by the borough, covers the vacation of parts of alleys upon which the appellant's property does not abut. He has therefore no standing to take an appeal under the act of 1891 or any of its supplements. We can only repeat what was said in our opinion refusing a preliminary injunction to restrain the railroad company from closing Strawberry alley: Nocton vs. Pennsylvania Railroad Company, 20 Montg. Law Rep., 25. The question of majority is to be determined by the persons in interest and number whose properties abut on the parts of the street to be opened or vacated: Speer vs. Pittsburg, 166 Pa., 86.

Again, as the borough did not interfere with any of the streets or alleys except to vacate parts of certain alleys, the appellant has no standing because the tenth section of the act of 1891 gives no right of appeal in the case of a vacating ordinance: Daughters of the American Revolution vs. Schenley, 204 Pa., 572.

It is argued that the borough ordinance widens the ten feet wide alley in the rear of the appellant's property. We can not so read this ordinance. The borough does not pretend to do anything on its part except to vacate portions of the two alleys. True, there is a provision in the second section of the ordinance that the railroad company shall do certain things as a consideration for the vacation. It is a declaration as to the acts to be done by the railroad company; the borough does not ordain any changes other than the two spoken of. But suppose the borough is responsible for the acts to be done by the railroad company, how is the appellant interested? He says the alley in the rear of his property is a private alley. If this be true, he still has his private alley in the exact location it always enjoyed. Nothing that the railroad company did made it a public alley. The ordinance of the borough did not pretend to make

it a public alley. Because the ordinance speaks of it as an existing public alley, does not make it such; certainly not, if such reference was a mistake on the part of the borough council. The language of the ordinance can not be construed as an act creating a public alley when the wording of the ordinance clearly shows that the borough council treated the alley as an existing public alley. If then the appellant's private alley—if it be a private alley—is in no way disturbed, how is he injured by any act of the borough or the railroad company? If the company saw fit to add ten feet to the private alley by giving that much ground on its side of the narrow passageway, what standing has the appellant to interfere so long as his alley remains intact?

The line of public improvement, in our opinion, embraces no more than the vacations of the parts of the two alleys; if, however, the line of improvement covers the ten feet dedicated to public use by the railroad company, still the appellant's land does not abut on this improvement. His land, if he is correct, abuts on a private alley, which remains just as heretofore.

Under any view of the case the railroad company is the only party whose land abuts on the line of the improvement. It follows that a majority in interest and number of the land-owners petitioned for the improvement, and the appeal must be dismissed.

And now, March 28, 1904, the appeal of John J. Nocton, filed February 9, 1904, is dismissed.

Orphans Court of Montgomery County.

Estate of Sarah J. Dickinson, Deceased.

Testatrix devised and bequeathed her estate to her husband, but subsequently in the will provided that should he not expend the whole of the estate it was her desire at his death to give what remained to her sister and brothers. *Held*, that the word "desire" as used in the will was mandatory not precatory, and that the intention of the testatrix, as gathered from the language of the will, was to give the estate to the husband; and if he did not convert, use and consume all of it in his life-time, what remained should pass as her estate to the sister and brothers.

Petition for decree directing the transfer of certain judgments.

Dickinson's Estate.

Henry Freedley and *A. R. Place, Esqs.*, for petitioner.

C. S. Sheive and *E. D. Egbert, Esqs.*, contra.

Opinion of the court by SOLLY, P. J., October 20, 1903.

Sarah Jane Dickinson, by her will, after directing the payment of her debts and funeral expenses, disposed of her estate in the following language: "All the rest, residue and remainder of my estate, real, personal and mixed, and wherever situated, I give, devise and bequeath unto my beloved husband, Henry B. Dickinson, his heirs and assigns. I give, devise and bequeath, at the option of my husband, all my wearing apparel to my sister, Annie Ulrich, and my sister-in-law, Elizabeth Dickinson, in such manner as he may see fit. And should my husband not expend the whole of my estate, then it is my desire at his death to give so much of it as remains to my sister, Annie Ulrich, and my two brothers, Algernon J. Martin and John J. Martin."

Letters testamentary were duly granted to the surviving husband. He died December 6, 1902, and since then letters of administration d. b. n. c. t. a. on the estate have been granted to the said Algernon J. Martin.

Among the assets of the estate were the following securities: A mortgage given by one Levi M. Landis, to secure the payment of $1,000; and two judgments against her sister, Annie E. Ulrich, entered in the Court of Common Pleas of Philadelphia county, one for $2,300 and the other for $500, which were both marked to the use of her husband after her death. The mortgage still stands in her name.

The administrator of the wife's estate claims that by the terms of her will these securities belong to it, not having been converted and consumed by the husband, and he is entitled to them for administration and distribution under her will; that the intention of the testatrix was to give her husband the full use of her estate with the power to consume it, and whatever remained unconsumed or unexpended at his death she bequeathed to her sister and brothers.

The husband's executor, on the other hand, claims that the estate vested in him absolutely; and that the subsequent clause of the will expressing her desire to give any unexpended part thereof at her husband's death, is not testamentary, but precatory merely.

If the intent of the testatrix, as ascertained from the four corners

of the will, was to give to her husband the use and enjoyment of her estate with the right to consume it, and to exercise full ownership over it, but in case he did not expend or consume all of it in his lifetime, then to give what remained unexpended or unconsumed at his death to other persons, then the prayer of petition must be granted and decree made.

The first sentence of the second paragraph of the will devises and bequeaths the whole estate to the husband absolutely. The next sentence bequeaths her wearing apparel to her sister and sister-in-law, at her husband's option, which is merely precatory. The concluding sentence expresses the desire of the testatrix to give the whole of her estate not expended by the husband to her sister and brothers. It is her wish to thus give her estate. It is not her desire or wish or recommendation that her husband shall give the unexpended estate to them. The estate is not committed to him with expression of desire as to how he shall dispose of it. The testatrix makes the disposition herself. She gives him the estate. This carries with it the power to convert, sell, convey, assign and transfer. He could have expended the whole of it, for there is no limitation, restraint or condition attached to the bequest. But if he did not consume or expend it, then what remained at his death she gave to others. This is the reasonable interpretation of the will. He did not consume the whole; what remains, therefore, is her estate, and passes by her will to the legatees.

Words in a will expressive of desire, recommendation and confidence may amount to a declaration of trust when it appears from other parts of the will that the testator intended not to commit the estate to the devisee or legatee or the ultimate disposal of it to his kindness, justice or discretion: Pennock's Estate, 20 Pa., 268. The principle of this case has been uniformly followed in a long line of later ones marking the distinction between words and expressions which are regarded as either precatory or mandatory: Jauretche vs. Proctor, 48 Pa., 470; Church vs. Disbrow, 52 Pa., 224; Burt vs. Herron, 66 Pa., 400; Bowlby vs. Thunder, 105 Pa., 178; Hopkins vs. Glunt, 111 Pa., 287; Boyle vs. Boyle, 152 Pa., 108.

"Where the words 'wish' and 'desire' are used in expressing a desire for an act to be done by some person named by the testator,

they are generally precatory merely; but no such presumption necessarily arises when the words are used to express the intention and will of the testator. In such cases they are held to be mandatory": Taylor vs. Martin (S. C.), 20 W. N. C., 27. This case is closely analogous to the one at bar. The testator devised and bequeathed all his estate to his wife "for her sole and separate use, behoof and control forever." In the next item of the will the testator stated that it was his desire and wish that after his wife's death a certain house and lot should go to his son. And in the next item he further stated that it was also his desire and wish that after his wife's death a certain other house and lot should go to his daughter for life, and after her death to his son.

The widow died in possession of the last mentioned house, which by her will she devised to her granddaughter absolutely. It was held that the widow took but an estate for life, and that the words "wish" and "desire" as used in the will were not precatory but mandatory as expressing the intention of the testator to dispose of the estate, and that the property passed to the son by the will of his father.

If a testator in one part of his will gives an estate of inheritance in lands, or an absolute interest in personalty, and in subsequent passages unequivocally shows that he means the devisee or legatee to take a lesser estate only, the prior gift is restricted accordingly: Sheet's Estate, 52 Pa., 257. And he may vest such interest in his legatee that he can exercise all the rights of an absolute owner by sale, conversion, investment in his own name, use, and consumption, without appeal in his life-time, and yet the estate be limited so that at his decease whatever remains unconsumed will go over: Good vs. Fichthorn, 144 Pa., 287.

The intention of the testatrix, as we gather it, was to give her estate to her husband; and if he did not expend, use or consume the whole of it, then what remained at his death she gave to her sister and brothers, the word "desire" being mandatory, not precatory merely.

The fact that the two judgments against Mrs. Ulrich were assigned and transferred by the executor to himself individually, does not make them his property and part of his estate; for, as was said in Tyson's Estate, 191 Pa., 218, it was not within his power to defeat his wife's intentions respecting the unexpended part of her

estate by such act. They are none the less her estate although standing in his name, and the Orphans Court has control over them and the power to order their transfer to her administrator.

And now, October 20, 1903, the prayer of petition is granted. Let decree be prepared.

Supreme Court of Pennsylvania.

Estate of Sarah J. Dickinson, Deceased.

Testatrix devised and bequeathed her estate to her husband, but subsequently in the will provided that should he not expend the whole of the estate it was her desire at his death to give what remained to her sister and brothers. *Held*, that the word "desire" as used in the will was mandatory not precatory, and that the intention of the testatrix, as gathered from the language of the will, was to give the estate to the husband; and if he did not convert, use and consume all of it in his life-time, what remained should pass as her estate to the sister and brothers.

Appeal of Israel B. Dickinson from the Orphans Court of Montgomery county.

The opinion of the court below will be found reported in Estate of Sarah J. Dickinson, Deceased, 20 Montg. Law R., 83.

Henry Freedley and *A. R. Place, Esqs.*, for petitioner.

C. S. Sheive and *E. D. Egbert, Esqs.*, contra.

Opinion of the court by Mitchell, J., April 18, 1904.

Per Curiam.—The decree is affirmed on the opinion of the learned judge below.

ESTATE OF ANNA R. SHARPLESS, DECEASED.

Where it appears that A and B, two of three executors of an estate, are insolvent and heavily indebted to the estate; that they are also the partners composing an insolvent firm in process of liquidation, of which the estate is a large creditor; and that they neglect or refuse, after repeated demands by their co-executor, to put it in possession of the information necessary to enable it to take steps to protect the estate and enforce by action at law the rights of the estate against them and the firm, the interests of the estate are being jeopardized, and they will be removed from their office under the act of May 1, 1861.

APPEAL of Henry W. Sharpless and Townsend Sharpless from the Orphans Court of Montgomery county.

The opinion of the court below will be found reported in Estate of Anna R. Sharpless, Deceased, 19 Montg. Law R., 120.

C. S. Sheive and *Charles S. Pyle, Esqs.*, for Henry W. Sharpless and Townsend Sharpless, respondents.

E. G. Hamersly and *Townsend, Elliott & Townsend, Esqs.*, for Fidelity Trust Company, petitioner.

Opinion of the court by MITCHELL, J., April 18, 1904.

PER CURIAM.—It appeared in the facts as found by the court below that the appellants were very largely in debt to the estate of their mother, of which they were co-executors; that they were insolvent, and had disposed of their business, in which a considerable part of their mother's estate was invested, for a large sum, the disposition of which they had refused to disclose to their co-executor; and that they had refused to furnish a statement of the condition of the account between the estate and their insolvent firm at the time of the mother's death. On these facts the court found that notwithstanding that the manual custody of the unconverted assets and securities of the estate was in the petitioner, and that the appellants under the will of their mother would be entitled to one-half of the residuary estate, yet nevertheless a condition of affairs existed as to the estate "which should not exist if the co-executors (appellants) would perform their plain duty."

"Two facts," said the learned judge in his opinion, "are distinctly found—namely, insolvency of these co-executors, and their placing the interests of this estate in jeopardy by refusing or neglecting to put their co-executor and co-trustee in possession of the information necessary to enable it to protect the estate and to enforce its rights against them individually and the firm of Sharpless Brothers. The estate is entitled to know what became of the moneys

realized in the liquidation of the business of the firm. With the firm on the one side a large debtor of the estate, two of the executors being the members of that firm and refusing to account, it is difficult to see how the Fidelity Company as one of the executors can act alone without the joinder of the other executors in compelling such accounting. If the insolvency of these executors had occurred before the death of their mother, and she had full knowledge thereof, that fact of itself might not be sufficient to dismiss them from their office. But where it is incumbent upon executors to protect the interest of their estate, and in the proper management of it to take steps necessary to preserve it or save it from loss, or where the knowledge concerning the interests of the estate is known to some of the executors and not to the others and they persistently refuse to furnish the information necessary for the proper protection of the estate, they are, to say the least, guilty of mismanagement."

The necessity of litigation to compel an accounting as to the proceeds of the sale of the business of the firm, and the difficulties of such litigation while the appellants continued in the position of executors, were further set forth by the court below.

In the most moderate view of the whole case it clearly appeared that the personal interests of the appellants were antagonistic to their duties as executors; that their conduct in the latter relation was obstinate and self willed, and dictated more by their personal interests than by those of the estate; and that their co-partner was impeded in the proper management of its part of the administration to such an extent as to jeopardize the estate itself. It was a clear case for removal in the discretion of the court, and the discretion was carefully and properly exercised.

Decree affirmed at costs of appellants.

Orphans Court of Montgomery County.

Estate of Terrence O'Donnell, Deceased.

Testator by his will executed within one calendar month of his decease devised and bequeathed the residue of his estate after the death of his wife and son to the pastor of a church or his successors for the purpose of saying masses for the testator and others. *Held*, that the devise and bequest being for a religious use was void under the act of April 26, 1855. P. L. 332.

If the bequest is to a church, a priest, or a layman for a religious use, it is void under the act. It is the use, not the character of the legatee, which makes the bequest void.

Petition of Richard W. O'Donnell for decree directing trustee to pay him one-third of the estate.

E. L. Hallman, Esq., for petitioner.

James B. Holland, Esq., for trustee.

Henry M. Tracy, Esq., for Rev. Richard Kennehan.

Opinion of the court by Solly, P. J., October 20, 1903.

Terrence O'Donnell, who died in the borough of Conshohocken on April 26, 1896, by his last will and testament, which is dated April 6, 1896, devised and bequeathed the rest, residue and remainder of his estate, after the payment of his debts, funeral expenses, and two pecuniary legacies, to a trustee to be appointed to collect the income, and to pay two-thirds thereof to his wife during life or so long as she remained his widow, and the other third to his son Richard during his life. Upon the death or remarriage of the wife the whole income is then payable to the son.

After the death of the wife and son all the estate is devised and bequeathed to "Rev. Richard Kennehan, or his successors of the St. Matthew's Church of Conshohocken, Penna., for the purpose of saying masses for myself, my now wife Ellen, and my deceased wife Mary."

The Albertson Trust and Safe Deposit Company was appointed trustee by this court to execute the trust, and received from the executors the balance of the personal estate in their hands on the settlement of their account. The testator was seized of a dwelling-house in Conshohocken, which passed into the charge of the trustee. The widow, while not formally electing to accept the provision of the will in her favor, has acquiesced therein and been in re-

ceipt of her share of the income to this time. The fund invested and held by the trustee amounts to $8,706.

The son claims that the devise and bequest over of the residue of the estate to Rev. Richard Kennehan, on the death of his mother and himself, being for a religious use, is void under the act of April 26, 1855, P. L. 332, the will having been executed within one calendar month of the death of the testator. His petition asks the court to so declare, and to decree the payment to him of one third of the estate in the hands of the trustee. A citation was awarded directed to the trustee, widow and Rev. Richard Kennehan to answer the petition. All have done so.

The trustee and the widow submit themselves to the judgment of the court. The devisee and legatee in remainder avers that he was not present at the execution of the will; had not discussed the matter with the decedent; and did not know that he was a legatee and devisee until after the will was probated. He denies that the devise or bequest is void.

By way of further answer he avers the following matters:

"The devise or bequest to him under the provisions of said will was a personal one and free from any charitable or religious use; that the same was a personal reward or compensation for the performance of services to be rendered, to wit, the saying of masses for the decedent, his wife Ellen, and his deceased wife Mary; that your respondent, or his successor at St. Matthew's Church of Conshohocken, will receive that compensation for services to be rendered for his or their sole use and benefit, to be used by him or them for his or their own personal use and benefit; that the practice of saying masses for the repose of departed souls or intercession on behalf of the departed is an established recognized function of the priests of the Roman Catholic Church. While masses are offered for the dead by the church without compensation, yet where an individual requests a mass or masses to be said distinct and apart from the regular services of the dead, it imposes an extra burden upon the officiating priest, requiring additional labor and time, for which he is entitled personally to be compensated by a stipend or reward always paid by the person requesting the services to be performed. This fee is the compensation allowed for the services rendered or to be rendered, and can be used by the priest receiving the same as he may see fit for his own personal expenditures."

The case was heard on petition and answers, and the matters therein contained, not traversed or denied, are to be taken as true. The question presented is whether the devise and bequest over of the residuary estate of the decedent after the death of the widow and son is void under the act of 1855, because for a religious use, or whether being to a priest as compensation to him for the performance of religious services, it is a personal legacy, and therefore not within the prohibition of the act.

The eleventh section of the act is as follows:

"No estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic or to any person in trust for religious or charitable uses, except the same be done by deed or will attested by two credible and at the same time disinterested witnesses at least one calendar month before the decease of the testator or alienor, and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, next of kin or heirs, according to law; provided, that any disposition of property within said period *bona fide* made for a fair and valuable consideration shall not be avoided."

The testator was a Roman Catholic and a member of St. Matthew's Church, and no doubt was familiar with the requirement to pay the officiating priest a stipulated sum for performing the ceremony of mass for souls of the departed, when specially requested, and also knew that the sum paid belonged to the priest as his compensation. His estate is given ultimately for one purpose, that the religious rite of mass for the dead may be performed.

It is said that as the bequest is a personal one by way of compensation to the legatee or his successors, pastor of the church, for the offering of mass, and as he can do with the money as he chooses, it is not for a religious use within the meaning of the act of 1855. But it has a trust fastened upon it, clearly and expressly defined. The purpose of it is for "saying masses." The estate can not be diverted to any other purpose. If diversion was attempted, equity would intervene and raise another trustee to administer it according to the intention of the testator: Schnorr's Appeal, 67 Pa., 138. The estate can be used for the one thing only.

The ceremony of mass for the repose of the souls of the departed is a religious use, so decided in Rhymer's Appeal, 93 Pa., 142. In that case the bequest was to a church to be expended in masses for

the benefit and repose of the soul of the testator. The court said, "While this may not be regarded as a charitable use within the accepted meaning of the word, it is certainly in every proper sense of the term and according to the obvious intendment of the act a religious use." The bequest was declared void, thereby reversing Powers's Estate, 5 W. N. C., 59. If the bequest is to a body politic, a church, or to the priest thereof, or to a layman for a religious use, it is void under the act. In principle there is no difference between Rhymer's Appeal and this one; if there is a difference, we frankly admit our inability to see it. There the bequest was to a church for a religious use; here it is to the priest of the church or to his successors for the same use. It is the use which makes the bequest void, not the character of the legatee.

The respondent cites Dougherty's Estate, 5 W. N. C., 356, and Hodnett's Estate, 154 Pa., 485, in support of his contention. But these cases are different from this one. In the former the residuary clause of the will devised the property to the executor in trust to sell and convert into money, and then divide it into two parts, and pay one to the priest of one church and the other part to the priest of another church, upon which payments they were requested to say, or procure to be said, masses for the repose of the souls of the testatrix and certain of her relatives. It was held that the words expressive of the request and devise of the testatrix were precatory, and the justice and discretion of the donee alone relied on, and the bequest was good.

In Hodnett's Estate the testatrix, by a codicil to her will executed two days before her death, gave half of the residue of her estate to the "pastor of St. John's Roman Catholic Church, of Altoona, Pa." It was sought to impress it with a trust, but it was held to be a legacy unaffected by a trust; and in the absence of any evidence, facts or circumstances tending to fasten upon the legatee a trust for either religious or charitable uses, he was entitled to the money in his own right. Neither of these cases shake Rhymer's Appeal in any way.

In cases of this kind the question must always be, What is the purpose of the bequest? If it is for a charitable or religious use, no matter who it benefits, it is void under the statute. Here the be-

quest is for a religious use; and the will having been executed within one calendar month of decedent's death, it must be declared void.

The bequest of the residue of the estate over upon the death of the widow and son having been illy given, and the residuary clause being void, it follows that the decedent must be considered as having died intestate as to the ultimate disposition of his estate: Gray's Appeal, 147 Pa., 67; Vaux's Appeal, 156 Pa., 194; Gorgas's Estate, 166 Pa., 269.

At this time we will not pass upon the right of the petitioner to have part of the fund paid to him by the trustee. It may be that the whole estate is distributable to the widow and the son under the intestate laws. The purpose of the will to preserve the estate for a religious use being void, it would seem that their life interests under the will, and their interest in the corpus of the estate itself under the intestate laws, have merged.

The account of the trustee should be filed, showing the amount of the estate on hand, and upon its audit and adjudication that question can be passed upon after full hearing.

And now, October 20, 1903, after hearing and due consideration, the legacy and devise to Rev. Richard Kennehan, or his successors of St. Matthew's Church, of Conshohocken, Pennsylvania, is hereby declared void; and it is ordered and decreed that the Albertson Trust and Safe Deposit Company, trustee of the estate of Terrence O'Donnell, deceased, within thirty days file in the proper office an account showing the amount of the estate in its hands, on the audit of which the question whether the same is presently distributable will be passed upon.

Supreme Court of Pennsylvania.

Estate of Terrence O'Donnell, Deceased.

Testator by his will executed within one calendar month of his decease devised and bequeathed the residue of his estate after the death of his wife and son to the pastor of a church or his successors for the purpose of saying masses for the testator and others. *Held*, that the devise and bequest being for a religious use was void under the act of April 26, 1855, P. L. 332.

If the bequest is to a church, a priest, or a layman for a religious use, it is void under the act. It is the use, not the character of the legatee, which makes the bequest void.

Appeal of Richard Kinahan from the Orphans Court of Montgomery county.

The opinion of the court below will be found reported in Estate of Terrence O'Donnell, Deceased, 20 Montg. Law R., 90.

E. L. Hallman, Esq., for petitioner.

James B. Holland, Esq., for trustee.

Henry M. Tracy, Esq., for Rev. Richard Kinahan.

Opinion of the court by Mitchell, C. J., April 18, 1904.

The contention of the appellant that the bequest was a personal one to him as compensation for services to be rendered, and therefore not within the act of 1855, can not be sustained. The bequest, it is true, is to him by name; but it is plainly to him not as an individual but by virtue of his office, for the words are "to Rev. Richard Kennahan, or his successor, of St. Matthew's Church," and "for the purposes of saying masses" for the testator and his wife. It thus appears that the bequest is to appellant not only as a priest of the church named but also for a specific use, and is thus charged with a trust. While, therefore, under the rules of the church, as set forth in appellant's answer to the petition, the money when earned might become the absolute property of appellant to be spent as he pleased, yet it can only be earned by the execution of the trust—to wit, the performance of the duties imposed by the testator's will.

These duties are clearly a religious use within the act of 1855. The case is not distinguishable in this respect from Rhymer's Appeal, 93 Pa., 142, where it was said by the late Chief Justice Sterrett: "The testator has clearly declared the use or purpose to which his bequest shall be applied. It is to be expended in masses for the benefit and repose of his soul. While this may not be regarded as a charitable use within the accepted meaning of the word, it is certainly, in every proper sense of the term and according to the obvious intendment of the act, a religious use."

The case of Hodnett's Estate, 154 Pa., 485, cited by appellant, is not at all in conflict with the views now expressed. In that case, while the bequest was to the pastor of a church, there was, as said in the opinion, "nothing in the will to indicate that the bequest is or ever was intended to be in trust for any religious or charitable use; nor is there, *dehors* that instrument, a scintilla of evidence of any such trust." And it was shown that the legatee was not present at the making of the will, nor had any communication with the testator relative to the bequest or testator's wishes in regard to it. What was decided in that case is that in the absence of any evidence in or *dehors* the instrument the law will not infer a trust for religious use merely from the professional character of an individual legatee, though it might if the legatee were an artificial body having but one character, and that religious or charitable (citing 1 Jarmon on Wills, 193: "A gift will not be deemed charitable merely from the nature of the professional character of the devisee"). In the present case, as already said, the bequest was not only to the appellant or his successor as pastor of the church, but express direction was given that it should be applied to a specific religious use. That brought it clearly within the prohibition of the statute.

Decree affirmed.

Court of Common Pleas of Montgomery County.

IN EQUITY.

TOWNSHIP OF WORCESTER VS. SOUDERTON, SKIPPACK AND FAIRVIEW ELECTRIC RAILWAY COMPANY.

The franchise of a street railway passing through several localities is an entirety, and the necessary local or municipal consent for the whole route must be obtained before the company has a right to build any part of its road.

Where there is no authority to build the chartered line there is no right to construct an extension.

Consent to build is essential; and the fact that certain abutting land-owners have not as yet opposed the construction, is not sufficient. The company, before it can build, is bound to show consent affirmatively.

APPLICATION for a preliminary injunction. No. 2, March T., 1904.

Edwin S. Nybe, Esq., for plaintiff.

Larzelere, Gibson & Fyz, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., April 14, 1904.

The defendant company was chartered as an electric railway corporation on July 28, 1902. It obtained its grant under the act of May 14, 1889, P. L. 211, and the act of June 7, 1901, P. L. 514. The route described in the charter begins in the borough of Souderton, at Main and Chestnut streets, and thence runs along Chestnut street to Wile avenue and over and along Wile avenue to a public road leading to Reliance. The route passes thence through the townships of Franconia, Lower Salford and Skippack. The route then enters into the township of Worcester by way of the Skippack road to Centre Point, thence leaving the Skippack road it passes along a public road leading to Fairview village, thence along the Germantown pike to the old Norriton church, thence leaving said pike and passing along a public road leading to Trooper, the terminus of the proposed railway.

The route along the Skippack road from a point near Cedars and thence running to Centre Point, is within the limits of Worcester township. The next two courses, ending at the Norriton church, are also in said township. The last course runs for a short distance west from the Norriton church on the line dividing the township of

Norriton from Worcester. A public road is located on this dividing line called "the township line road."

The company adopted articles of extension whereby it may build an extension to begin "at the toll-gate of the Harleysville and Souders turnpike road at the head of Main street of the borough of Souderton, thence along said Main street for the distance of one thousand two hundred and seventy-five feet to Summit avenue and the tracks of the Philadelphia and Lehigh Valley Traction Company." The charter route is located on streets within the borough of Souderton. It is claimed that the extension does not fall within the said borough limits.

The township of Worcester gave its consent to the defendant company "to construct and operate its railway over certain roads in said township." The written agreement with the township supervisors gives "the right and privilege to lay its tracks on the public road running between Fairview village and Centre Point, and also between Centre Point and the Skippack township line, on either side of said highways which may be found necessary and most desirable to use, and shall be allowed to make such diversions from said highways as second party shall deem advisable and in the line of good engineering skill."

The line of railway located and adopted does not pass down the Germantown pike to the Norriton church, but crosses the said Germantown pike at Fairview village. The route then passes for a distance of about one hundred feet over the public road leading from the said turnpike to the creamery. The located line then diverges from the creamery road and crosses over private grounds until it meets the Trooper road beyond the limits of Worcester township. This diversion was made to escape the heavy grades on the Germantown pike and the Trooper road. The diversion cuts off a corner and shortens the distance materially. The creamery public road is not mentioned in the Worcester township consent except so far as it may be covered by the right to make diversions from the highways named.

The defendant company has no consent from the municipal authorities of the borough of Souderton to construct a railway on the streets of said borough.

The land-owners abutting on the public roads in Franconia, Lower Salford, Skippack, Worcester, Norriton and Lower Provi-

dence townships, along which the railway is to be built, have consented to its construction, with the possible exception of William H. Detweiler and his opposite neighbor. It is claimed that these consents can be obtained; but they have not, in fact, been secured.

The Worcester consent stipulated that the railway company "shall begin to construct said road by April 1, 1904, and have the same completed by July 1, 1905, unless the time be otherwise extended."

On the night of March 27, 1904, the company had some materials hauled into Worcester township, and shortly after midnight commenced the laying of a short piece of track—about one hundred and twenty-five feet long. March 27th was Sunday, and the teams started with the materials about ten o'clock in the evening of that day.

We have recited the facts fully because a statement of them shows clearly that the defendant company is not in a position to begin the construction of its railway. The company has not secured the consent of the borough of Souderton. It will not do to say that the company can build its extension without entering on the streets of the borough, and that this extension will answer its needs. Where there is no authority to build the chartered line, there is no right to construct an extension. "No case affords any sanction to the idea that the company may proceed to construct an extension and in the meantime abandon or indefinitely defer the carrying out of its original franchise": Hannum vs. Railway Co., 200 Pa., 44. There is no evidence before us that the company has taken legal steps to abandon the part of its chartered route located in Souderton borough.

The franchise of a street railway passing through several localities is an entirety, and the neccssary local or municipal consent for the whole route must be obtained before it has a right to build any part of its road: Montgomery Passenger Railway vs. Pennsylvania Railroad Co., 167 Pa., 62. The township of Worcester may take advantage of the want of consent by the municipality of Souderton, even if the consent given by Worcester is complete: Wheeler & Boody vs. Pennsylvania Railroad Co., 194 Pa., 539; Hannum vs. Railway Co., *supra*.

Failure to gain the consent of Mr. Detweiler and his opposite neighbor is also a matter that stands in the way of defendant company. "Finding that there was no evidence that any abutting property-owner in the townships had refused consent, is not enough.

Consent is essential to the right to build at all, and the defendant was bound to show it affirmatively: Hannum vs. Railway Co., *supra.* This may not be a serious matter; no doubt these consents can be secured.

We can find nothing in the act of June 7, 1901, P. L. 514, that changes the long line of decisions that the consent of all the municipalities must be obtained before any part of the road can be built. The act just cited declares that the company shall have two years in which to secure the consent, and during this period no rival company can interfere. This protection gives all the less excuse for an attempt to begin construction before all the consents are obtained. The late case of the Coatesville and Downingtown Railway Co. vs. West Chester Railway Co., 206 Pa., 40, decides no more than this, that the act of 1901 was intended to protect the charter of a company from the danger of having its privileges taken away during two years by the superior activity of a wealthy and influential rival.

It may be well for the company to consider whether work done before April 1, 1904, will protect its Worcester consent, if such work was done without any warrant of law. This midnight construction does not commend itself to our favor. Whether the Worcester consent covered the creamery public road we shall not now decide. If the supervisors knew at the time the consent was given that the company intended to make the divergence at Fairview village over private grounds, it may well be that the agreement was intended by both parties to cover all the needs of the defendant company. If such was the intent, it would be an act of bad faith to repudiate the agreement on the ground that consent was not given to build the railway.

And now, April 14, 1904, a preliminary injunction is awarded restraining the said defendant company, its contractors, agents and employees, from constructing an electric railway over or along any of the public roads in said township of Worcester until the further order of the court. The plaintiff will enter bond in $1,000 before such injunction issues.

A. ADDIS YERKES AND ANNA R. YERKES, HIS WIFE, VS. JOHN B. STETSON, JR.

In a suit against a minor son who lives with his father, a summons served by handing a copy to the father at his dwelling house, the son being absent from the state, is a proper service on the minor under Sec. 1, clause (b), act of July 9, 1901, P. L. 614.

MOTION to strike off service of writ. No. 76, December T., 1903.

Theo. Lane Bean and *Algernon B. Roberts, Esqs.*, for plaintiffs.

Larzelere, Gibson & Fox, Esqs., for defendant.

Opinion of the court by WEAND, J., April 18, 1904.

The writ in this case is in the ordinary form, and, according to the return of the sheriff, was served as follows: "Served John B. Stetson, Jr., by handing, November 19, 1903, a true and attested copy of the within writ to an adult member of his family at his dwelling-house, said adult being his father, John B. Stetson, Sr."

The reason for setting aside the service as set forth in the petition of John B. Stetson is that said John B. Stetson, Jr., party defendant in said suit, is a minor between the ages of fourteen and twenty-one years; that said minor was at the time of service, and still is, absent in a distant state for his protection; and that the house referred to in said return is not the dwelling-house of the infant but of your petitioner, and is his exclusive property.

By the act of July 9, 1901, P. L. 614, a writ of summons is to be served:

(a) By handing a true and attested copy thereof to him personally; or,

(b) By handing a true and attested copy thereof to an adult member of his family at his dwelling-house; or

(c) By handing a true and attested copy thereof, at his place of residence, to an adult member of the family with which he resides.

All the material facts necessary to a decision of the case are set forth in the petition to set aside the service and the answer thereto. It is not necessary to cite authority to show that the defendant, being a minor, has not by a mere temporary absence acquired a domicile or residence separate from his father; the only question being as to the regularity of the service which was made under clause (b). If

the "dwelling-house" of the father is also, within the meaning of the law, the "dwelling-house" of a minor son living with his father, then the service was strictly in accordance with the requirements of the act. In personal actions in this state the law makes no distinction as to the method of service of original process between a minor and an adult; but after service, before judgment can be taken against a minor, he must have a guardian.

It is claimed by counsel for this motion that the service upon a minor must be personal; and that the dwelling-house of the father was not the dwelling house of the son.

To hold the first proposition to be true would be equivalent to saying that by mere temporary absence service could be avoided if by personal service is meant service upon him individually and not by leaving a copy with others. If so, in this case, if the minor is fourteen years of age, by remaining away at school, or for his health, for seven years, he would not lose his domicile or residence in the county (his father remaining), and thus prevent service. We can not so construe the law.

By clauses (b) and (c) the act provided for different classes. In the first (b), where the defendant has a dwelling-house, or what is known generally as a home—where a person resides permanently with his family; by (c), where the defendant resides or lives with others, with persons not members of his family—not at his own home or dwelling-house, a distinction being drawn between "residence" and "dwelling-house."

A person may have a dwelling-house without being the owner, and hence the term in clause (b) is not used in the sense of ownership but of occupation. A minor's home, habitation or domicile, whichever term is used, is *prima facie* with his parent, and it is therefore his dwelling-house or place of abode. Anderson's Law Dictionary defines "dwelling" in these words: "A person has his dwelling where he resides permanently or from which he has no present intention to remove"; "dwelling-house—a description of realty."

This service, therefore, was made at the dwelling-place of the defendant, being at the house where he lived, and the house or place recognized by law as his home or domicile.

If this position is correct, then the service upon his father was also "upon an adult member of his family," else it could not be made upon him at his dwelling-house unless handed to him person-

ally. A minor, unless married, strictly speaking, has no family of his own, but he is a member of his father's family; and in that sense every member of the father's family is also a member of the family of the others comprising the household.

The Century Dictionary defines "family" to mean: 1. "The collective body of persons who form one household under one head and one domestic government, including parents, children and servants, and, as sometimes used, even lodgers or boarders." 2. "Parents with their children, whether they dwell together or not; in a more general sense, any group of persons closely related by blood, as parents, children, uncles, aunts, and cousins—oftener used in a restricted sense only of a group of parents and children founded on the principle of monogamy." 4. "In the most general sense, those who descend from a common progenitor."

It is no answer to say that the son resides with his father, and that therefore it is "his place of residence" within the meaning of clause (c). It is his place of residence; but it is also his dwelling-house, within the meaning of the act of Assembly. The law did not intend to change the family relationship in this regard when it merely provided for a method of service of process in a personal action; and clause (c), in speaking of service at his place of residence, did not place a minor living with his parents on the same basis as a defendant residing or living with others and not at his own home or dwelling-house.

And now, April 18, 1904, the motion to set aside the service is overruled.

J. B. Alexander and M. P. Anderson vs. Philadelphia and Reading Railway Company.

A provision in the contract between a shipper and common carrier that notice of any claim for damages shall be given to the carrier is binding upon the shipper, and failure to give the notice will defeat a recovery in an action for negligence.

Motion to take off non-suit. No. 124, June T., 1903.

George W. Zimmerman, Esq., for plaintiffs.

Evans & Dettra, Esqs., for defendant.

Opinion of the court by Swartz, P. J., May 16, 1904.

The action was brought by the plaintiffs to recover damages which they allege were sustained by delay in the shipment of a car load of cattle.

The contract under which the plaintiffs shipped the cattle provides that "no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier or sued for in any court by the said shipper unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent and delivered to the company's railroad agent of the said carrier, at his office, in Richmond, Pa., within five days from the time the said stock is removed from said car or cars." No notice of any kind was served on the carrier or his agent at any time. The suit was brought without any presentation of a claim to the defendant or any connecting carrier. This was admitted at the close of plaintiff's evidence.

Under the law the defendant was entitled to a non-suit. In Pavitt vs. Lehigh Valley Railroad Co., 153 Pa., 302, it was held that a provision for notice in the exact words found in the contract before us is a reasonable regulation and one that the railroad company may enforce. "The defendant has a right to hold the shipper, this plaintiff, to the reasonable promptness provided in the contract for the presentation of his claim."

And now, May 16, 1904, the motion to take off the non-suit is overruled.

BLANCHE GERTRUDE KECK vs. J. EDGAR HEILMAN.

The burden of proof that a contract was made on Sunday is on the party assailing the contract.

The fact that a contract of marriage was made on Sunday can not avail the defendant where there is evidence of its subsequent recognition by him.

DEMURRER to plaintiff's statement. No. 20, October T., 1903.

Wm. F. Dannehower, Esq., for plaintiff.

Montg. Evans and *John Faber Miller, Esqs.*, for defendant.

Opinion of the court by SWARTZ, P. J., May 16, 1904.

The plaintiff brought her action for a breach of promise of marriage.

Her statement sets out a solemn engagement of marriage between defendant and plaintiff on Christmas day, 1898. She further alleges that "the defendant solemnly promised said plaintiff that he would marry her some time in the month of June, 1903, and that such promise was made in September, 1902, and that both she and the defendant then and there mutually promised to marry each other, and that the said defendant in consideration of the plaintiff's promise entered into his engagement of marriage." She also alleges that "the defendant presented her with an engagement ring."

The demurrer raises the question whether the contract is binding because made on Sunday, the 25th day of December, 1898.

If this Sunday promise were the sole contract in the case, it would be necessary to pass upon the validity of a promise of marriage made on Sunday. But this is not the fact, according to the statement. A specific promise was made in September, 1902, that the marriage should take place in the following June. We can not assume that this additional contract was made on Sunday. The burden of proof that a certain contract was made on Sunday is on the party assailing it: American and English Encyclopedia of Law, Vol. 24, page 568 (first edition).

The plaintiff also alleges that an engagement ring was given to her by the defendant, and that she accepted it. Even if both promises were made on Sunday, the defendant by subsequent acts and conduct recognized the contract as an existing one. This is sufficient to sustain her action. The fact that a contract of marriage was made on Sunday can not avail the defendant where there is

evidence of its subsequent recognition by him: Markley vs. Kessering, 2 Penny., 187; Fleishman vs. Rosenblath, 20 Pa. C. C. R., 512.

Giving and accepting the engagement ring is a clear recognition of an existing contract to marry.

And now, May 16, 1904, the demurrer is overruled.

IN EQUITY.

JAMES THOMAS, JAMES D. FAUST AND GEO. W. YOUNG VS. LANSDALE AND NORRISTOWN ELECTRIC RAILWAY COMPANY.

In a suit to foreclose a mortgage given by a corporation in the hands of a receiver, a creditor will not be allowed an order to inspect the books of the company before hearing, where the purpose is not clearly stated so as to show petitioner's interest, the information desired, and the purpose. Where the only purpose is to deny the ownership of the bonds, for default of payment of the attached coupons a sale is asked, the opposing creditor can attain his object by a subpœna to produce the books at the hearing.

The order asked for was not against the plaintiffs, owners of the bonds, but against a co-defendant; and there was no averment of collusion, or that the bonds were illegally issued, or that plaintiffs were not *bona fide* holders of the requisite amount.

PETITION to produce books and papers. No. 3, December T., 1903.

Evans, Holland & Dettra, Esqs., for plaintiffs.

Larzelere, Gibson & Fox, Henry Freedley and *A. R. Place, Esqs.*, for defendant.

Opinion of the court by WEAND, J., April 14, 1904.

On January 4, 1904, this court, under proceedings for that purpose, appointed receivers for the defendant company. On February 29, 1904, the petition of the Lehigh Valley National Bank, Bethlehem, was presented, in which they prayed to be allowed to intervene as defendants, and for a decree authorizing them to apply to the Easton Trust Company, trustee, for foreclosure of a mortgage given by said railway company to said trustee to secure an issue of bonds, the petitioners alleging that they were the holders of $92,000 of said bonds, and that by the terms of said mortgage, in case of default for sixty days after demand for payment of the coupons attached to said bonds, the whole principal should become due, and

the trustee should on application of the holders of at least one-fifth of the bonds foreclose the said mortgage and sell the property. On this petition the court made an order allowing the petitioners to intervene as defendants, and granted a rule on all parties in interest to show cause why the prayer to foreclose should not be granted, returnable May 5, 1904, at eleven o'clock.

J. J. Speck, on his petition as a creditor, was also allowed to intervene as a defendant, as was also the Schuylkill Valley Traction Company. On March 21, 1904, the petition of J. J. Speck, now under consideration, was presented, in which he alleges that he is intervening creditor whose rights are adverse to the rule granted the bank, and that he desires to make answer thereto; that the receivers appointed by the court and the defendant, the Lansdale and Norristown Electric Railway Company, decline to allow him to inspect the books of said defendant without the court's order; and that said inspection is necessary to prepare said answer. He prays for an order on said receivers and defendant, the Lansdale and Norristown Electric Railway Company, to produce at Norristown the minute-book of said corporation showing its corporate acts, the contracts for construction of said road, and such books of account as show the receipts and disbursements of capital and issue and disposition of bonds and proceeds thereof.

In his petition to intervene the petitioner alleges that he was a contractor to build the defendant's railway, and that he is a creditor on that account.

The information to be gained by an inspection of the books could only at this time be proper to show that plaintiffs should not be allowed to demand a foreclosure of the mortgage. The corporate acts, the contracts for construction, and the books showing receipts and disbursements of capital, are foreign to plaintiffs' demand. If they are the *bona fide* holders of the requisite number of bonds, they may be entitled to have the mortgage foreclosed, and the information desired by this petitioner would have no bearing on the case. On the hearing of the rule on May 5th plaintiffs will be required to show all that is necessary to support their petition, and Mr. Speck can by subpœna compel the production of books, etc., showing to whom and for what bonds were issued; and having his rights, if he has any, thus secured, we do not think it proper to place at his disposal the books, accounts, etc., of defendant company in

order to support his claim against them. If one creditor was allowed this privilege, others would also be allowed, thus leading to interminable delay.

The petitioner's standing or rights can not be affected by a refusal of his petition. All that is asked is that a sale of what is alleged as an insolvent corporation be had, and on a question of distribution the rights of creditors can be determined.

Whether Mr. Speck's claim will be discharged or divested as a lien or claim need not now be decided. In either event, we fail to see why he should be allowed his petition.

Before the court can make an order such as is here asked for, the purpose should be clearly stated so as to show petitioner's interest, the information desired, and the purpose. The only reason assigned in the petition is that it is necessary to enable petitioner to make answer without denying plaintiffs' allegation of ownership of bonds, default, etc. The rule to be heard May 5th is only for the purpose of establishing plaintiffs' right to proceed to collection. As this right is not denied at this time, there would be no object in an inspection of the books.

The act of February 27, 1798, Sec. 1, 3 Sm., 303, Purd. Dig., 12th ed., 813, provides that "on motion, and upon good and sufficient cause shown by affidavit or affirmation, the court may," etc.; and in Rose vs. King, 5 S. & R., 244, the court said, "Every order to produce papers under the act of Assembly must be founded on a previous affidavit, which, as the law is highly penal, should set forth with precision every fact necessary to authorize the court to proceed." This petition is not sworn or affirmed to, and assigns no fact which he desires to obtain in order to make answer. In other words, he is seeking an opportunity to make a defence without knowing what it is or is to be, or showing any reason why he should answer. It will be observed that the order asked for is not against the plaintiffs but against a co-defendant, and no averment of collusion between plaintiffs and defendant, or that bonds were illegally issued, or that plaintiffs are not *bona fide* holders of the requisite amount.

Even if the requirements of the act of 1798 above cited are not applicable, we think that no sufficient ground has been made which would warrant us in making the order prayed for.

And now, April 14, 1904, the application is refused.

IN EQUITY.

TOWNSHIP OF SPRINGFIELD VS. THE NORTH SPRINGFIELD WATER COMPANY AND D. DAWSON YEAKEL, SUPERINTENDENT.

A township of the first class can not compel a water company to furnish free fire plugs and free water for use in case of fire.

In making regulations the township is confined to the matters specified in the act of May 16, 1889, P. L. 226, and in the exercise of its police powers it can not legislate and impose conditions which have no connection with the safety and protection of the highways. Free fire plugs do not add any protection or convenience to public travel on the highway.

The township has no right to collect toll from the water company for the privilege of doing business in the township.

Where the right to occupy streets without the consent of the municipality is given by the Legislature, the municipality may not impose terms except such as fall within its police power.

APPLICATION for a preliminary injunction. No. 3, March T., 1904.

John Faber Miller, Esq., for plaintiff.

Evans, Holland & Dettra, Esqs., for defendants.

Opinion of the court by SWARTZ, P. J., April 25, 1904.

The township of Springfield is a township of the first class. The defendant water company has four or five miles of mains and pipes within the lines of the public highways of said township. Some of these pipes were laid before the plaintiff became a township of the first class.

On September 2, 1903, the plaintiff township passed an ordinance requiring all water companies to pay to the board of township commissioners one dollar for a permit to open the surface of any highway for one thousand feet or any fraction thereof. The ordinance also required that such permit to be effectual shall impose on the water company the duty "to erect and thereafter forever maintain one fire-plug for each and every one thousand continuous feet of its line theretofore laid or to be laid in the township, which said plugs shall have locations and be of a design and construction satisfactory to the board of commissioners of said township, and shall be constantly and forever kept in repair and sufficiently supplied by said applicant with water for ready use in case of fire at his, their or its exclusive expense; and on the failure of such applicant to maintain such fire-plugs, the said board of commissioners shall have the undisputed right to remove his, their or its pipes."

The company asked for a permit to lay an extension of its pipes for about six hundred feet, and paid a dollar to the secretary of the board of commissioners. The permit was granted with the proviso that "any right acquired by said company hereunder shall be exercised only after compliance by it with the terms, provisions and requirements of Ordinance No. 18 of said township, adopted September 2, 1903."

The company answered that "it would not comply with the provisions of Ordinance No. 18 so far as the stipulations of Section 2 require the erection and maintenance of fire-plugs and supplying water therefor free of cost. The company denies the validity of that portion of the ordinance as imposing upon the company a liability and duty not warranted in law."

The plaintiff then filed this bill to restrain the defendant company from opening any of the streets or roads of the township until it complied with that part of Ordinance No. 18 relating to the erection of fire plugs.

Under the ordinance and its interpretation by the plaintiff, the water company must erect not less than twenty-five fire-plugs and supply them with water ready for use in case of fire. It must keep them thus supplied for all time, and without any compensation whatever. This it must do before it can lay one foot of new pipe.

The statement of the case is sufficient to show that the attempted requirement of the ordinance, so far as it relates to free water and free fire-plugs, is without any warrant in law.

The act of April 29, 1874, P. L. 73, with its amendment of May 16, 1889, P. L. 226, defines the rights and duties of a water company. It may enter upon "streets, lanes, alleys, roads and highways and bridges, and occupy, ditch, and lay pipes through the same." It may condem land under certain conditions, making compensation to the owner: Act of May 26, 1893, P. L. 158. The rights of the township over such company are set out in the act of May 16, 1889, P. L. 226. The company in occupying streets for its pipes must observe the following provisions: "To repair the same from time to time, subject to such regulations in regard to streets, roads, lanes and other highways, and impairing the free use thereof as little as possible, and subject to such regulations as the councils of said borough, town, city or district may adopt in regard to grades or for the protection and convenience of public travel over the same."

The township may regulate the grades of the streets and require such action on the part of the water company as will give protection and convenience to public travel on the streets. It may also establish police regulations that are reasonable and proper for the protection and convenience of public travel. Requiring the company to pay a reasonable sum to the township to be expended in the supervision of the work done within the highways is a proper exercise of the police power, vested in every municipality: Springfield Water Co. vs. Darby Borough, 199 Pa., 400

In making regulations the township is confined to the matters entrusted to it by the act of 1889, and in the exercise of its police power it can not legislate and impose conditions which have no connection with the protection and safety of the highways. Free fireplugs will not add to the safety of a public road, nor will they give protection or convenience to public travel.

The assent of the township was not necessary to give the water company the right to enter upon the public roads. If such assent were requisite, still the township would have no right to couple with it any condition or restriction not imposed by the acts under which the defendant was chartered: Appeal of the City of Pittsburg, 115 Pa., 21. As already shown, the act of 1874 and its amendments do not confer upon the township any rights except such as relate to the protection and convenience of public travel on streets occupied by the water company. What right has the township to determine that free water shall be supplied by the defendant company? In speaking of the rights of a water company in Brymer vs. Butler Water Company, 179 Pa., 249, the Supreme Court say: "The ownership of a corporation is as absolute and comprehensive as that of a private citizen. It includes the right to put a value upon its property and to determine on what terms it will part with it or supply its customers with the commodity in which it deals, in the same manner that an individual or partnership could do." True, the act of 1874 confers upon the Court of Common Pleas the right to hear complaints where there is an allegation of an exorbitant charge; but surely this furnishes no warrant for an order of the court that a consumer may take water without any compensation whatever. The township has no right to collect toll from the water company for the privilege of doing business within the township. The right to furnish water and charge a reasonable rate for the service was conferred

by the Legislature. The right to use the public highways for that purpose was conferred by the same authority. Where the right to occupy streets without the consent of the municipality is given by the Legislature, the municipality is not in a position to impose terms. It has no power to do so. We must in such case look to the legislation incorporating the company and defining its powers and privileges for the right which the municipality may exercise over the corporation: Philadelphia vs. Empire Passenger Railway, 177 Pa., 382. In the case before us the township is specifically limited to the matter of grades and to regulations pertaining to the protection and convenience of public travel over the highways occupied by the water company. Even if the township may impose conditions of the character named in Ordinance No. 18, the one now under consideration is so unreasonable that no court can enforce it.

A somewhat similar attempt was made to secure free electric lights for the city of Scranton, but the effort failed: Scranton Electric Light Co. vs. City of Scranton, 1 Lackawanna Jurist, 177; and by the city of Pittsburg to obtain free gas for its police, school and market buildings, but it too failed: Appeal of City of Pittsburg, 115 Pa., 4.

And now, April 25, 1904, the ordinance, so far it relates to a fee of one dollar for a permit to open a street, is valid as a proper police regulation; but the conditions coupled to the permit, requiring free fire-plugs and free water in cases of fire, are in our opinion invalid, and the preliminary injunction is therefore refused.

Montgomery Insurance, Trust and Safe Deposit Company, &c., vs. Silas Cary, Sarah Cary et al.

Where an administrator sells real estate and takes a mortgage for part of the purchase money, and the money represented by the mortgage is a trust fund, upon an application of the administrator for the appointment of a trustee to hold the fund the mortgage passes to the appointed trustee and his successors in the trust without any formal transfer of the mortgage. Especially is this so where the administrator files an account showing that the mortgage is the clear balance of the trust fund in his hands.

Rule for judgment for want of a sufficient affidavit of defence. No. 72, March T., 1904.

Trust Co., &c., vs. Cary et al.

Henry Freedley and *E. L. Hallman, Esqs.*, for plaintiff.

Samuel H. High, Esq., for Elijah Lukens, defendant.

Opinion of the court by SWARTZ, P. J., April 25, 1904.

William P. Lukens died intestate, and his administrator, Joseph Lukens, sold the real estate of the decedent for payment of debts. The real estate was purchased by Sarah Cary, who gave a mortgage to the administrator for $1,450 as part of the purchase money. The account filed by the administrator shows that this sum of $1,450, represented by the mortgage, constituted the entire balance of the estate after payment of the debts of William P. Lukens, deceased.

William P. Lukens left to survive him a widow and one child, a daughter, intermarried with George W. Cornell. This daughter died before the real estate was sold by the administrator. Her husband was entitled to the entire income of the $1,450, subject to the dower interest of the widow of William P. Lukens, deceased.

The administrator petitioned the court for the appointment of a trustee to invest the principal fund and pay out the income to the persons legally entitled thereto, and upon their death pay over the said principal sum to the heirs of Mrs. Cornell. Silas Cary was appointed trustee for the purposes named. He collected and paid over the income for ten years, and was then upon his own application discharged from the trust. George Hand was appointed his successor in the trust, and upon his death there was a vacancy for some years. On January 19, 1904, the Montgomery Insurance, Trust and Safe Deposit Company was appointed the substituted trustee. During all these years the purchase money mortgage of Sarah Cary, executed in 1874, remained undisturbed, so far as there is any evidence upon the subject in the papers submitted to us.

The interest being in default, the Trust Company issued a scire facias on the mortgage.

An affidavit of defence was filed by one Elijah Lukens, who alleges that the mortgage in question is no part of the trust estate represented by the plaintiff; that the plaintiff is not a proper party to the scire facias proceeding; that the suit must be brought by an administrator *de bonis non*. He also claims that the mortgage was paid by Sarah Cary in her life-time. He does not state when or how the money was paid. He avers that he believes it was paid. "It has never been held enough to prevent judgment to say I paid the debt or I do not owe the claim": Snyder vs. Powers, 3 Walker, 277.

The allegation that the mortgage forms no part of the trust estate is contradicted by the record showing the appointments of the successive trustees. The trustee was appointed to take charge of the balance of the estate of William P. Lukens, deceased. This balance, as shown by the petition for a trustee, was $1,450. The account filed and referred to in the petition shows the same fact. The mortgage itself shows that it was given for part purchase money in the sale of the real estate of William P. Lukens. The mortgage represented all the balance of the estate in the hands of the administrator. If the mortgage did not constitute the trust estate, then there was no fund whatever to pass into the custody of the trustee. The trustee paid the interest on the $1,450 to the persons entitled under the distribution in the estate of William P. Lukens. This mortgage was the only source of income. Clearly, the mortgage constituted the only fund over which the successive trustees had any control.

There is no occasion for an administrator *de bonis non.* All the property of the decedent was disposed of. The administrator could not pay over the fund because of the life interests therein. For his relief the court appointed a trustee to hold the fund. By this appointment the legal title to the mortgage vested in the trustee, and so as to each successive trustee. "The debt being everything and the mortgage barely a security for the payment of it, it follows of necessity that whatever affects the debt will produce a corresponding effect upon the mortgage. . . . So a transfer of the debt will likewise be a transfer of the mortgage": Craft vs. Webster, 4 Rawle, 255. It was certainly the intent of the administrator Lukens as well as of the appointed trustee to pass over the security to the latter by the court proceedings. The administrator intended to divest himself of all claim or interest in the mortgage. Cary, the trustee, accepted the mortgage in lieu of cash, for he collected the interest and paid it over to the persons holding a life interest in the fund.

A formal transfer of the trust estate is not necessary where a trustee is discharged and the court appoints a successor: Act of June 14, 1836, Sec. 26. By this statute the trust estate vests immediately upon the appointment of the successor and his entering security.

And now, April 25, 1904, the rule for judgment for want of a sufficient affidavit of defence is made absolute.

JOSEPHINE MYNICK VS. RICHARD W. BICKING.

Where a dispute has arisen within the meaning of the act of May 25, 1887, P. L. 270, and the defendant obtains an order on the plaintiff to issue a scire facias on her mortgage in this county, the court will not tolerate an evasion of the forum and process pointed out by the law.

Where the bond accompanying the mortgage is entered in another county, where the defendant has no property and where neither of the parties resides, the court will stay an execution issued on the transcript judgment entered in this county. Among equal courts, that which has the primary control of a question has the absolute control.

While we can not inquire into the merits of a judgment obtained in another county, we will not compel the defendant to commence proceedings to contest the judgment in the foreign county, but will stay the execution process in this county, over which we have full control.

RULE to stay execution. No. 43, March T., 1904.

Joseph S. Goodbread and *Joseph Fornance, Esqs.*, for plaintiff.

Henry Freedley, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., April 25, 1904.

The defendant executed a bond and mortgage for $1,000 on April 15, 1892, in favor of the plaintiff. The negotiations regarding the said mortgage were had between the defendant and one Silas Jones, a member of this bar. Mr. Jones was lending money for the plaintiff, and the defendant made application to Mr. Jones for the loan. At the time the mortgage was negotiated Mr. Jones informed the defendant that he could pay off the loan in installments.

The defendant paid to Mr. Jones six hundred dollars. Of this sum only one hundred dollars was paid over to the plaintiff, Miss Mynick. When these payments were made to Mr. Jones the papers were in the custody of the plaintiff.

The mortgage was overdue, and one David Goodbread, the agent for Miss Mynick, addressed a letter to the defendant in which the writer stated that inasmuch as the defendant contested a portion of the principal due on the mortgage the plaintiff would be obliged to commence proceedings of foreclosure on the mortgage. The letter called for the name of defendant's attorney, so that communication could be opened with him. The defendant employed counsel, who wrote to Mr. Goodbread, "When you commence proceedings direct the sheriff to me, and I will accept service and save the costs for you." This letter was dated November 4, 1903. As early as October 23, 1903, the defendant made a tender of four hundred and fifteen and ten one-hundredths dollars to the plaintiff. He was ready to pay the amount that he claimed was due. He was anxious

to have his liability on the mortgage legally determined. The controversy between the parties related to the payment of the five hundred dollars. Miss Mynick contended that this was a mispayment, and therefore not a credit upon the mortgage. A dispute had arisen within the meaning of the act of May 25, 1887, P. L. 270. On December 19, 1903, counsel for defendant obtained an order from the court directing the sheriff to notify the plaintiff to issue a scire facias on her mortgage, as provided by said act of 1887. This notice was served on the plaintiff on December 28, 1903.

Judgment was entered on the bond accompanying the mortgage on November 25, 1903, in the prothonotary's office in Philadelphia, and on December 4, 1903, a transcript of this judgment was filed in Montgomery county.

The plaintiff disregarded the notice to issue the scire facias, but on January 26, 1904, she caused an execution to be issued on the Montgomery county judgment obtained by transcript. The defendant has no property in Philadelphia, and no attempt was made to levy on any property of the defendant in Montgomery county other than the real estate covered by the mortgage. Both parties live in Montgomery county, and the mortgaged premises are also located in said county. The only purpose of the execution was an attempt to collect by that process the face amount of the mortgage, less one hundred dollars, out of the real estate encumbered by the mortgage.

On February 15, 1904, an answer was filed to the order directing a scire facias to issue; and without any demand for a hearing the plaintiff issued her scire facias on the mortgage on February 20, 1904.

We think the facts just recited indicate an effort on the part of the plaintiff to evade the forum and the method pointed out by the law for the trial of a dispute such as has arisen in this case.

The controversy arose as early as October 23, 1903, and yet the bond was entered in Philadelphia on November 25, 1903, although the defendant had no property in that county and no inquiry was made as to the existence of property within that jurisdiction. Again, execution was issued in Montgomery county one month after the plaintiff was directed to issue her scire facias.

If the defendant would contest the judgment he is compelled to go to Philadelphia, for in that court alone can the merits of the judgment be questioned. As well might the defendant be driven

to the other end of the state to make his defence. He has no interests in Philadelphia; his property is in Montgomery, and both parties to the issue are residents of the latter county.

The plaintiff notified the defendant that she would forclose her mortgage. The defendant answered that he was ready to defend his payment of five hundred dollars. When she failed to move in the matter the defendant attempted to force an issue in the very form suggested by herself. The order to bring her scire facias antedated the execution; the mortgage proceeding, therefore, has priority. As the scire facias was issued, the defendant must answer that suit or abandon his payment of five hundred dollars. At the same time he must attack the Philadelphia judgment, or his property will be sold without any redress. Why should he be put to this double expense when the merits of the controversy can be adjudicated in a single action, and one which the law points out? The defendant was prompt in availing himself of the remedy provided by the act of 1887.

The plaintiff is under no disadvantage in the scire facias proceeding. In that action, as well as in an issue on the judgment, the burden will be on the defendant to show a valid payment on account of the mortgage. Under either method, if the defendant fails to make out a case there is no question of fact for submission to a jury.

While we can not inquire into the merits of the Philadelphia judgment, we have full control over the execution process which issued from our own court: Nelson vs. Guffey, 131 Pa., 273.

"A judgment transferred to another county bears a very strong analogy to a testatum execution; it is transferred only to facilitate its enforcement. The primary judgment is still the principal one, and the court where that is can alone take any action operating on the judgment itself." When, therefore, the execution was issued it was for all practical purposes a proceeding on the primary judgment. It was an execution issued on a record from the Philadelphia court. The scire facias proceedings in Montgomery had the priority of time. "Among equal courts, that which has the primary control of a question has the absolute control": King vs. Nimick, 34 Pa., 297.

Inasmuch as the scire facias on the mortgage was issued, and as that suit is now pending, there is no good reason shown why the

defendant should be driven into another forum to try the issue now pending in this court. In any event, the defendant is entitled to a stay of the execution so that he may have an opportunity to make his defence by an attack against the Philadelphia judgment. The suit on the mortgage is in fact at issue and ready for trial before a jury.

And now, April 25, 1904, the execution issued on January 26, 1904, on the judgment obtained by transcript from Philadelphia is stayed.

Orphans Court of Montgomery County.

Estate of Jacob Z. Godshalk, Deceased.

Where the rights of other parties have not intervened the Orphans Court has power to revise its adjudication and correct an error in distribution; and this is so even after the decree of the court has been affirmed by an appellate court on matter upon which the distribution was based.

When claim is made at the audit of an account to a legacy or distributive share by virtue of an attachment execution, the proper practice is to attach to the statement of claim a copy of the docket entries in the suit. Unless the defendant appears and agrees that his share shall be awarded to the attaching creditor, the court will direct the accountant to retain same until the final determination of the attachment.

Petition to open adjudication.

E. L. Hallman, Esq., for petitioner.

Montg. Evans and *A. R. Place, Esqs.*, for accountants.

H. M. Brownback, Esq., for Union National Bank of Souderton, attaching creditor of Benjamin L. Godshalk.

Opinion of the court by Solly, P. J., May 17, 1904.

At the audit of the account of the executors there were presented and allowed two claims against the share of Benjamin L. Godshalk, a distributee. There was awarded to Henry W. Reiff, a creditor under an assignment of the interest of said Godshalk, $375, and to the Union National Bank of Souderton, under an attachment execution attaching the share of said Godshalk, $56.55. These awards absorbed the full share to which Godshalk was entitled.

Questions were decided which arose out of other matters, and an appeal from our decree was taken to the Superior Court. In the

meantime the fund in the executors' hands was not distributed. After the appeal had been argued, and before decision was rendered, Benjamin L. Godshalk, the defendant in the attachment, presented his petition praying that the adjudication be opened so far as the distribution of his share of the estate was concerned, in order that his claim for exemption against the bank's judgment might be allowed. Beyond permitting the petition to be filed, we declined to do anything until the record was returned from the appellate court. The decree of this court having been affirmed, and the fund being still undistributed, a rule was granted to show cause why the prayer of the petition should not be granted, service of which was accepted by counsel for the bank and the executors.

In its answer the bank admits the main facts of the petition to be true, but avers that as Godshalk did not present his claim for exemption at the audit he is guilty of laches, and is now estopped from having the relief granted. Further, the power to open the adjudication is denied, inasmuch as it has been finally confirmed by the appellate court.

We will consider the last objection first, because if the court is without the power to open the adjudication the prayer of the petition must be denied. The appeal to the Superior Court related solely to the question whether the fund was to be distributed in accordance with the provisions of the will of Jacob Z. Godshalk or under the terms of a certain deed as if he had died intestate.

The claims of the bank and Reiff were practically admitted to be correct. Our decision had nothing to do with the matter now in controversy. The appellate court only dealt with the question raised by the appeal. The adjudication, as affirmed, established the method of distribution of the fund and the rights of the several parties under the will of Jacob Z. Godshalk. So far as Benjamin L. Godshalk was concerned, his interest as distributee was ascertained, and the amount of his share awarded to those persons found to be entitled. The fund in the hands of the executors remains intact. No distribution has been made. The rights of no other parties have intervened. It is manifest no one will be injured by correcting the error complained of, if we have power so to do.

Courts have the inherent power to grant relief to prevent injustice being done by reason of error committted unintentionally and innocently, where the rights of other parties have not intervened.

While in strictness the petition here may not fall under the act of October 13, 1840, 2 P. & L. Dig., 3297, because there is no allegation of error in the account, nevertheless the Orphans Court has discretionary power outside of that act to correct its errors injurious to any of the parties that can be done without prejudice to intervening rights. "The power is one which belongs to every court of justice, and is essential to the performance of duty": Young's Appeal, 99 Pa., 74.

It was sald in Milne's Appeal, 99 Pa., 483: "We have no doubt about the power of the Orphans Court to revise and correct its former adjudications, if in those adjudications it discovered a palpable mistake produced either by its own inadvertence or by the blunder of the parties. A sense of fair dealing and justice would be authority enough, in the absence of any other, for so holding."

To the same effect are the cases of Parker's Appeal, 61 Pa., 478; Whelan's Appeal, 70 Pa., 410; Minnick's Estate, 179 Pa., 591; Gillen's Appeal, 8 W. N. C., 499; Connolly's Estate, 34 Pitts, 301. In Parker's Appeal, *supra*, it was held that the Orphans Court can entertain a bill of review under the act of October 13, 1840, notwithstanding a decree of affirmance by the Supreme Court. We think the court has power to correct the schedule of distribution in order that the balance of the share of Benjamin L. Godshalk, after the payment of the debt to Reiff, may be awarded to said Godshalk, under his claim of exemption, unless he has lost his right to the same by the failure to present the claim at the audit.

The Union National Bank, having obtained a judgment against Godshalk, issued an attachment execution thereon in the Court of Common Pleas of this county, and attached his interest in this estate in the hands of the executors. The writ was returnable March 3, 1902, and duly served on the defendant and garnishees. On the return day Godshalk filed in the prothonotary's office his claim of exemption. Beyond the issuing of the writ, service and filing of the exemption claim, nothing further was done. Interrogatories were not filed, and no judgment obtained against the garnishees. At the audit the claim of the bank upon the attachment sur judgment was presented with statement of the debt, interest and costs due, and the court awarded to claimant the balance of the ascertained share of Godshalk, after first deducting the claim of Reiff under the prior assignment. The attention of the court was not called to the filing

of the exemption claim. Counsel for the bank states he was not aware that the claim had been made or filed. Counsel for the garnishees failed to draw attention to it.

Through oversight of all the parties concerned the court was left in ignorance as to the state of the record in the Common Pleas. Had the statement of claim been accompanied, as it should have been, with an abstract of the docket entries in the attachment proceeding, the fact of the filing of the claim for exemption would have appeared, the error would have been avoided, and this trouble prevented. Where claims to legacies or distributive shares are presented at the audit of accounts by virtue of attachments execution, good practice requires that a copy of the docket entries of the suit be made a part of the statement to be filed under the rules of court.

The claimant can not be deprived of his exemption because of his failure to present his claim to this court, or because of the omission of counsel for the plaintiff and of the garnishees, the executors, to call our attention to it. The claimant was not bound to formally make claim at the audit. He had filed it in the suit, as he was bound to do. It was made and filed in time: Evans vs. Evans, 13 Montg. Law R., 164. We fail to see wherein the claimant is guilty of laches. He was justified in standing upon the record of the suit which showed his claim to exemption and nothing done to defeat it. He had the right to rely upon plaintiff producing the record when it came into this court, for it would show that he had claimed the exemption, and plaintiff would not be awarded anything from his share of the estate until his exemption had first been awarded him. The plaintiff had record notice of the claim. No steps were taken to defeat it in the Common Pleas, and it stands on the record in full vigor.

The allegation made at the argument that Godshalk fraudulently assigned his interest in the estate is not sustained by any evidence. It is true the assignment was to H. W. Reiff and A. H. Godshalk, and it appeared at the audit that the latter did not make claim because he did not wish to appear and press it, although the assignor was indebted to him at the date of the assignment. He had the right to waive his claim. The bank can not complain of his action. The objection urged at the argument that Godshalk can not claim his exemption, because the assignment is absolute upon its face, can not be sustained. It was understood all around that it

was collateral merely, and all parties at the audit so agreed. Godshalk assigned his interest in the estate as security for a debt. This he had the right to do. As against the bank's attachment to recover upon its judgment he claimed his exemption. Surely, without something to show that he could not do so, the claim is good. If his right was lost by some act of his, it seems to us that is a question for the Common Pleas to determine, unless perhaps all parties submit themselves to the Orphans Court.

This case has brought up a matter of practice to which the court draws attention. It has been customary at the audit of accounts for the plaintiff in an attachment execution, where a legacy or distributive share has been attached, to simply present a statement of the amount claimed, debt, interest and costs, and have same awarded. A copy of the docket entries is not filed. It is seldom that judgment has been recovered against the garnishee. The practice is wrong, unless the defendant appears and agrees that the claim shall be awarded by the auditing judge, without recovery of judgment in the attachment suit. A copy of the docket entries in the suit should always be filed with the claim.

Where the defendant does not appear and agree that the claim shall be awarded to the attaching creditor, the proper practice, where the legacy of a legatee or the share of an heir in decedents' estates is attached under an attachment execution, is for the Orphans Court upon the audit of the account to ascertain the amount of the legacy or distributive share to be paid to the legatee or heir and direct it to be retained by the accountant until the final determination of the attachment: Valentine's Appeal, 3 W. N. C., 471 (S. C.); Rees's Appeal, 19 Ib., 421 (S. C.); Poulston's Estate, 11 Phila., 151; Douglass's Estate, 10 D. R., 479.

And now, May 17, 1904, this case came on for hearing, and after argument and due consideration it is ordered, adjudged and decreed that the adjudication of the account of Jacob C. Godshalk and Benjamin L. Godshalk, executors of Jacob Z. Godshalk, deceased, and the distribution be opened so far as relates to the share of Benjamin L. Godshalk, so as to correct the same by allowing him his exemption as against the claim of the Union National Bank of Souderton, Pa. It is further ordered, adjudged and decreed that the share of said Benjamin L. Godshalk, to wit, $431.55, is awarded as follows: To E. L. Hallman, Esq., attorney for Henry W. Reiff,

under assignment, $375; to E. L. Hallman, Esq., attorney for Benjamin L. Godshalk, on account of his exemption claimed in attachment execution, Union National Bank of Souderton, Pa., vs. B. L. Godshalk, No. 102, March Term, 1902, C. C. P. of Montgomery county, $56.55—$431.55. In all other respects the schedule of distribution shall remain.

Court of Common Pleas of Montgomery County.

JOSEPH TRANK VS. JOHN GYSLING AND LENA GYSLING.

A sheriff can not be both seller and purchaser; and when he acts as his own auctioneer, it is against public policy that he should bid on the property either for himself or as the agent of another.

Under Sec. 2, act of June 4, 1901, P. L. 364, taxes become a lien on the land when they are assessed; and on a sale on execution during their lien are payable out of the proceeds of sale, although no claim therefor has been filed in the office of the prothonotary.

EXCEPTIONS to sheriff's costs. No. 45, March T., 1904.

Samuel H. High, Esqs., for plaintiff.

Hillegass & Larzelere, Esqs., for John Larzelere, Sheriff

Opinion of the court by WEAND, J., May 16, 1904.

The property was sold to the execution creditors for $4,000, and the sheriff claims poundage on the whole amount. After payment of costs and taxes the whole balance of purchase money goes to the plaintiffs.

The sheriff acted as his own auctioneer, and placed several bids on the property for a person who was not present but who authorized him to bid $4,000.

Was this act of the sheriff illegal, or so improper as to prevent him from claiming poundage? Had he not placed a bid plaintiffs would have obtained the property at their bid of $100. "The rule is that the sheriff or other officer making the sale can not become the purchaser of the property sold, either directly or indirectly, at least without the knowledge and consent of both the creditor and the debtor; and he is not authorized to bid for the property either

for himself or as the agent of another": 25 American and English Encyclopedia of Law, second edition, 754, citing Crook vs. Williams, 20 Pa., 342; Mills vs. Goodsell, 5 Conn., 475; Coleman vs. Maclean, 101 Ga., 303; Knight vs. Herrin, 48 Me., 533.

The reason for the rule is well expressed in the argument of counsel in Mills vs. Goodsell, *supra:* "A sheriff at a sale by him on an execution is entrusted *by law* with the custody of the property seized on it, and is constituted the trustee or agent both of the debtor and the creditor, with specific directions not from them or either of them but from the *law*, as to the manner of the sale and the disposition of the proceeds of it. It is the law which creates the trust. And discharging the duties of it he is so to conduct it as to secure the just rights of the creditor and the debtor, both having an interest in the property—the debtor, to realize from it all which a fair competition at a sale by auction will produce; and the creditor, to obtain an application of all which a sale so conducted, or so much of it as is necessary to satisfy his demand, will procure. The object then being to give both the parties in the execution the full benefit of a free, unrestrained competition by the bidders at a public sale, it is obvious that the law will countenance no mode of proceeding which would enable the sheriff, if he were so disposed, to deprive either party of this benefit. The law guards not only against the actual commission of fraud by relieving against its intended effects when perpetrated, but closes the avenues to its approach by removing the temptation to practice it."

In Lessee of Lazarus vs. Bryson, 3 Binn., 54, the court said: "The law has entrusted the sheriff with the important charge of selling the property of debtors on execution; and it will not endure that the same person should be both seller and purchaser. Not but that in many cases the sale might in fact be fair and honorable; but from a principle of the soundest policy, from the temptation to dishonest practices to which the officer would be exposed, and from the difficulty of detecting him where he acted fraudulently. I consider this principle as settled; and indeed it has not been questioned by the counsel for the defendant." The same reasoning can be applied when the sheriff acts as agent for another, and the same principle ought to apply. In the case before us the sheriff was acting not only as sheriff, charged with the sale, but also as auctioneer and as agent for another.

As sheriff his duty was to get the highest price; as agent, to get the lowest. His interests were inconsistent and antagonistic. When he acted as agent he became personally interested for his principal, when his duty was to the creditor and debtor. A sheriff, especially when he acts as his own auctioneer, has opportunities for quickly knocking down the property at his own bid, which gives him an advantage over others and affords opportunities and temptations to which he should not be exposed.

We consider it against the policy of the law that such practice should be continued or tolerated. This is not to be considered a reflection upon the sheriff, who no doubt acted with good intentions; but a sale held by a public officer in obedience to the mandates of the law should be so conducted as to afford equal opportunities for competition to all, and this can best be done when every incentive for dishonesty or cause for suspicion is removed. A sheriff entrusted with an execution should act only as the officer of the law without any other conflicting interests, either for himself or as an agent for others.

The second exception is to the payment of the taxes which were for 1903. The mortgage was also recorded the same year.

Under Sec. 2 of the act of June 4, 1901, P. L. 364, these taxes were a first lien on the land against which they were assessed; but it is objected that the sheriff had no authority to pay them from the proceeds of sale, because no claim had been filed in the prothonotary's office.

This contention is based upon that part of Sec. 1 of the act which says, "The words 'tax claim,' as used in this act, mean the claim filed to recover taxes"; and on Sec. 32, which reads, "On any such sale being made, all tax claims shall be paid out of the proceeds thereof first." The sale here spoken of is a sale upon a judgment recovered upon a claim, and does not comprehend a sale on an ordinary execution before a claim is filed. The second section makes all taxes lawfully imposed or assessed, etc., first liens, and the other sections referring to filing of claims are for preservation of liens. Sec. 10 reads: "Claims for taxes, etc., must be filed in the Court of Common Pleas of the county in which the property is situated, on or before the last day of the second calendar year after that in which the taxes or rates are first payable." "If a claim be not filed within the time aforesaid, or if it be not prosecuted in the manner and at

the time aforesaid, it shall be wholly lost," thus showing that the lien exists for two years. There can be no virtue in a claim filed except to preserve it, for taxes under Sec. 2 become liens when lawfully assessed; and to obtain the right of payment from the sheriff, the collector is only required to present the proper voucher. Every purchaser and execution creditor is presumed to know that taxes are liens, and can bid accordingly. Taxes are for the benefit of the public; delay in their payment causes inconvenience and loss to school directors, supervisors, etc., and the object of the law was to protect the public by making them payable out of the proceeds of sale on execution. Where there is no execution creditor and no personal property liable to seizure, the claim can be filed, judgment obtained, and sale had on the "tax claim."

And now, May 16, 1904, the exception to the sheriff's charge of $27.50 poundage is sustained. The exception to the payment of taxes is overruled.

RICHARD L. HYNES VS. EMMA RIEHL AND GEORGE W. RIEHL.

The rule that for a joint tort there can be no recovery upon proof of one or more separate torts, applies in a case where a husband and wife were sued as joint trespassers.

To sustain a joint action of tort there must be some physical act done in which two or more actually participate; but where one commits the tort, and another, without acquiescence, participation or consent, merely reaps an advantage, a joint action of trespass can not be sustained.

MOTION for a new trial. No. 188, October T., 1903.

Larzelere, Gibson & Fox, Esqs., for plaintiff.

Evans, Holland & Dettra, Esqs., for defendants.

Opinion of the court by WEAND, J., May 26, 1904.

At the conclusion of the testimony the court directed a verdict for defendants, and plaintiff moves for a new trial.

The action is "trespass," and the statement charges defendants with "having permitted the natural water-courses upon their said property to become filled up; and have also filled up several of the ancient and natural water-courses, so as to turn the water from the defendants' land over and upon the land of the said plaintiff."

The defendants were charged with both sins of commission and omission; but no joint physical act was shown, nor was there a par-

ticle of testimony to show, that the husband did anything charged against them with the consent, knowledge or acquiescence of the wife.

There was not only no proof of a joint trespass or tort, but no evidence except inferentially that either defendant had obstructed the water-course or done anything to cause the damage. And if either or both defendants were liable after notice of the obstruction, there was no testimony from which the jury could find whether any or what damage was thus caused.

In a suit for a joint tort there can be no recovery upon proof of one or more separate torts. When a joint tort is charged, a joint tort must be proved in order to sustain the action: Goodman vs. Coal Township, 206 Pa., 621.

The jury under no circumstances, as shown by the testimony, could have found that Mrs. Riehl, either actively or constructively, had done plaintiff any injury; and they could only have found that Mr. Riehl did something from inference to be drawn from the fact that water was thrown onto plaintiff's land which ought to have run over defendants' land.

Nor is the plaintiff's case sustained upon the allegation that defendants did not promptly remedy the wrong, if any, when their attention was called to it; for here again they are charged jointly—the wife charged as owner and the husband as being liable for the torts of his wife. And at best we would have the husband liable for obstructing the flow and the wife for afterward permitting it, bringing the case within the ruling in Magee vs. Pennsylvania Schuylkill Valley Railroad Co., 13 Pa. Sup. Ct., 187, where it was held that "in an action of trespass against a turnpike company and an individual owner of land to recover damages for injuries to plaintiff's land caused, first, by an increased volume of water thrown upon the land and, secondly, by the pollution of the water, a verdict and judgment against both defendants as joint tort feasors can not be sustained if it appears that, although the increase in the volume of water was the joint act of the two defendants, the pollution of the water was the act of the individual defendant alone."

To sustain a joint action of tort there must some physical act be done in which two or more actually participate; but where only one commits the tort, and another without acquiescence, participation or consent, merely reaps an advantage, a joint action can not

be sustained. It is claimed, however, that the relation of husband and wife will sustain the action. A husband may be presumed to be the agent of the wife in many respects, but not to do a wrong or commit a tort without her consent.

"The common law liability of the husband for the tort of the wife remains without statutory modifications. For a tort committed by his direction he alone is liable": Hess vs. Heft, 3 Pa. Sup. Ct., 582. As there was no evidence that the wife actually committed a trespass, there could be no joint liability. In this case the wife is not relieved because of the marriage relation, but because there is no evidence to convict her of any wrong and because there was no act of her husband for which she is liable.

"It seems to be the common law rule that a married woman can not be a trespasser by prior or subsequent assent; and that accordingly she can not, by reason of prior or subsequent assent or authority from her, be held liable for the tort of her husband or any third party in which she does not participate as an actor": Am. & Eng. Ency. of Law, 2d edition, Vol. 15, p. 900. Finding, therefore,

1. That there was no direct evidence as to who obstructed the water-course, there was no joint tort proved;

2. There was no evidence of any tort by the husband to which the wife consented or acquiesced, or which was done by her direction or with her consent; and,

3. That there was no evidence of any act of the wife for which both the husband and wife were liable, we think our direction was proper.

And now, May 26, 1904, the motion for new trial is overruled.

ROYAL GAS STOVE AND FOUNDRY COMPANY VS. PHILADELPHIA AND READING RAILWAY COMPANY.

Plaintiff shipped stoves over defendant's road from Montgomery county, Pennsylvania, to New Orleans, Louisiana. One of the conditions printed on the bill of lading provided: "No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or consignee." In a suit for damage to the stoves, the first carrier in its affidavit of defence alleged that no accident or injury to the cars occurred prior to the time of delivery to the next connecting road; that the cars were then in good condition, having sustained no injury; and that if any injury did occur to the cars containing the stoves, such injury occurred on other roads. *Held*, to be sufficient to prevent judgment.

MOTION for judgment. No. 27, June T., 1904.

Bok vs. Bok.

Henry Freedley and *E. L. Hallman, Esqs.*, for plaintiff.

Montg. Evans and *James Boyd, Esqr.*, for defendant.

Opinion of the court by WEAND, J., May 16, 1904.

The plaintiff shipped gas stoves over defendant's and connecting roads to New Orleans, La. When the stoves arrived at their destination a number were found to be broken, and this suit is brought against the receiving company for damages sustained.

To reach New Orleans the goods would have to pass over several connecting roads; and of this fact plaintiff had knowledge from the bill of lading.

One of the conditions printed on the bill of lading reads: "No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or consignee." The affidavit of defence alleges that the cars containing the stoves were delivered to the Lehigh Valley Railroad Company at Allentown; that no accident or injury to the cars occurred prior to the time of delivery to said connecting railroad; and that the cars were then in good condition, having sustained no injury. It further alleges that if any injury did occur to the cars containing the stoves, such injury occurred on other roads and such damage was occasioned by the travel upon the connecting lines after the goods had left the care of the defendant company. This is a specific denial of any injury occurring on defendant's road, and is sufficient to prevent summary judgment.

And now, May 16, 1904, motion for judgment is overruled.

BESSIE W. BOK VS. WILLIAM J. BOK.

Divorce—Jurisdiction.

The parties were residents of New York, were married in that state in 1893, and lived there for one year when respondent deserted his wife. For the last four years he has resided in Montgomery county, Pennsylvania. The libellant has always lived in New York.

Held, the Montgomery county courts have no jurisdiction to decree divorce. Her claim of residence within this commonwealth is based entirely upon the ground that the domicile of the wife follows that of the husband, but in order to give jurisdiction it must appear that the libellant had an actual residence in the state for the term of one year.

DIVORCE. No. 21, October T., 1903.

Bok vs. Bok.

Report of the master recommending that the libel be dismissed for want of jurisdiction.

H. M. Brownback, Esq., for libellant.

Evans, Holland & Dettra, Esqs., for respondent.

Opinion of the court by SWARTZ, P. J., May 16, 1904.

The libellant and respondent were living in the state of New York at the time of their marriage, in January, 1893. They were married at the libellant's h >me in said state. They made this house their residence for about one year, when the respondent deserted his wife. She remained at the house of their common domicile, and the husband after leaving her lived at different hotels in the city of Brooklyn, New York. About four years ago the husband left New York and made his residence in Lower Merion township, Montgomery county, Pennsylvania. The libellant continued to live in New York. She never had any actual residence in Montgomery county or in Pennsylvania, but claims a constructive residence at the domicile of her husband in this county. In her libel she declares that she is a citizen of Pennsylvania, and resided therein for more than one year previous to filing the same.

In her original examination before the master she says: "I have no occupation other than keeping house with my sister, at our joint residence, 605 Madison street, Brooklyn, New York, where I have been living for the last five or six years." At a subsequent hearing she testified: "My legal residence is with the respondent, my husband, in Lower Merion township, Montgomery county, where he has resided for the period of three years last past; but I am at present living with my sister at 605 Madison street, Brooklyn, New York, because of the desertion of my husband." It is not shown that she was at any time at her husband's residence in Pennsylvania. Her claim of residence within this commonwealth is based entirely upon the ground that the domicile of the wife follows that of the husband, even where he deserts her in one state, their common residence, and takes up his residence in another state. She contends that this legal status continues even where she is proceeding against him adversely for his wrong in separating himself from her.

Her ground of divorce is desertion, and the cause arose in the state of New York. The libel was served on the respondent, and

he entered an appearance. No answer was filed, and he did not appear before the master.

Under the act of April 26, 1850, P. L. 591, the courts of Pennsylvania have jurisdiction even where the desertion occurred while the parties were domiciled in another state. This jurisdiction, however, was conferred provisionally. It can be exercised only where the applicant for divorce shall be a citizen of the commonwealth or shall have resided therein for the term of one year.

Where the words "resident" or "residence in the state" are used, the statute means actual residence; the wife's constructive domicile in the state where the husband resides is not sufficient: American and English Encyclopedia of Law, Vol. 9, 735 (second edition), and cases there cited from New York, New Jersey, New Hampshire, Wisconsin and other states. In our own case of English vs. English, 19 Pa. Super. Ct., 586, the same rule is recognized. In that case the husband resided in Philadelphia at the time of his marriage; and the wife alleges in her libel that "immediately after their marriage, on April 10, 1900, the libellant and respondent resided together in Philadelphia, in the state of Pennsylvania, and have since resided in the state of Pennsylvania at Philadelphia." The jurisdiction was sustained upon this allegation because her evidence did not contradict the averment. If under the law her residence was in Philadelphia because the domicile of the wife follows that of the husband, then the jurisdiction was not open to question, and there was no occasion to base the jurisdiction upon her uncontradicted averment in her libel. In Ames vs. Ames, 7 Pa. Super. Ct., 456, the libel was filed in the county where the parties resided at the time the alleged cause of divorce arose. The fact that the libellant was compelled to go elsewhere in order to earn a living did not take away the jurisdiction of the court in the county where the cause of divorce arose, and where the respondent still resided. There is good reason to hold that the domicile of the injured wife is the domicile of the husband, who retains his residence where the cause of divorce occurred, although she is forced to leave such residence by his misconduct; but where he takes up a new residence in another state, after such injury, it would be a serious hardship upon her to hold that her domicile followed him. A proceeding for divorce in such new state upon his application would have to be entertained, if his residence is also her residence. This is not the law: Bishop vs. Bishop, 30 Pa., 416; Reel vs. Elder, 62 Pa., 308.

The wisdom of granting divorces in one state where the cause occurred in another state, and where such cause in the latter state may not be recognized as a good ground for divorce, is at least questionable. The applicant should be compelled to bring himself clearly within the conditions prescribed by the statute conferring jurisdiction. The Pennsylvania statute, no doubt, was passed in relief of any person who may take up an actual residence in our state. As a resident, he was to enjoy the same privileges that are accorded to her citizens. Where there is no actual residence—only a constructive one, under a legal fiction of the law—the applicant is not in our opinion complying with the requirement which demands a residence in the state for the term of one year.

The libel sets out that the husband deserted the wife and absented himself from her habitation. This allegation seems inconsistent with the claim that during all the period of the desertion his residence was also her residence.

It is argued that the appearance of the respondent and allegations in the libel cure any question of jurisdiction where the respondent does not enter an objection. This is not the law where the record shows that the libellant did not reside for the term of one year in the state: English vs. English, 19 Pa. Super. Ct., 596; and the evidence submitted is part of the record from which the question of jurisdiction must be ascertained: English vs. English, *supra*. An affidavit clearly shown to be untrue can not defeat or circumvent the statute.

It is also contended that the doctrine that the wife's domicile follows that of her husband will be enforced where her interests demand it, but not where the husband as libellant would invoke it to her prejudice. This may be true; but, as we view the case, her constructive domicile in Pennsylvania, if admitted, will not answer the conditions of the statute requiring a residence for the term of one year.

The very able report of the master is self sustaining.

And now, May 16, 1904, the divorce prayed for is refused on the ground that under the record the court has no jurisdiction to grant the same, and the libel is dismissed.

LAURA GILBERT VS. ELMER Y. GILBERT.

Divorce—At achment to enforce decrees.

The act of April 15, 1845, P. L 455, authorizes the court to enforce its decrees in divorce by attachment; at the same time it was not the intent of the act to imprison where the respondent has no ability to comply with an order to pay money.

DIVORCE. No. 123, October T., 1903.

Rule for an attachment to enforce the payment of counsel fees and costs.

Louis Goodfried and *Jos. S. Kratz, Esqs.*, for plaintiff.

Hillegass & Larzelere, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., April 25, 1904.

We made an allowance to the wife of twenty-five dollars as counsel fees in her divorce proceeding. This order was made before a decree of divorce was entered. After the decree was filed we awarded a rule against the respondent to show cause why he should not be attached to compel the payment of the counsel fees and the costs in the divorce proceedings.

In answer to the rule he showed that he was wholly without means to pay the money. He has a small income from his wages, but owns no property. He has the care of the two children, aged nine and eleven years respectively. He pays their board and sends them to school.

We are satisfied that the act of April 15, 1845, P. L. 455, authorizes the court to enforce its decrees in divorce by attachment. At the same time we are convinced that it was not the intent of the act to imprison where the respondent has no ability to comply with the order to pay the money. It is useless to send a man to jail where there is no ability to pay. There is no willful default on the part of the respondent, and he is honestly doing all he can to comply with the order of the court. If he can secure a more lucrative employment, and then fails to pay, we will award the attachment.

The rule is discharged, with leave to renew the application when the financial ability of the respondent has improved.

JOHN LARZELERE, SHERIFF, VS. ELLEN H. DELP.

Affidavit of defence—Denial of truth of Sheriff's return.

On a suit by sheriff to recover damages against a defaulting purchaser of real estate for loss upon a resale, the defendant, in her affidavit of defence, denied that she authorized anyone to bid for the property.

Held, that the return of the sheriff as to sale can be contradicted by defendant, and, if the defence be sustained by proof, must be submitted to a jury.

MOTION for judgment for want of a sufficient affidavit of defence. No. 38, June T., 1904.

J. A. Strassburger, Esq., for plaintiff.

Henry Freedley and *A. R. Place, Esqs.*, for defendant.

Opinion of the court by SWARTZ, P. J., June 1, 1904.

This suit was brought by the sheriff against the defendant to recover damages for breach of contract. The sheriff alleges that the said defendant became the purchaser of certain real estate at a public sale held by him as the sheriff of said county, and that she defaulted by failing to pay the purchase money according to the bid at which the property was knocked down to her. He further declares that at a resale the property did not bring as much as at the first sale, when the defendant became the purchaser. The defendant in her affidavit denies that she purchased the property, and alleges that she never authorized any one to bid for her or to buy the property for her. She denies that she had any contract with the sheriff at any time.

Counsel for plaintiff contends that this defence is insufficient because the sheriff's return declares that the defendant became the purchaser, and that such return can not be contradicted. We can not agree to this doctrine.

To say that a person who had nothing whatever to do with the sale must pay damages and then sue the sheriff for a false return, imposes a hardship that is most unreasonable. The foundation of the action is the sheriff's return; and at one time it was questioned whether a return which is the sheriff's own act could be used as evidence in his own favor. The court held that it was *prima facie* evidence of the fact therein alleged, but might require but slight proof before a jury to counterbalance the return: Hyskill vs. Given, 7 S. & R., 369. This was reaffirmed in Sheerer vs. Lantesberzer, 6 Watts, 551, where the court say: "In a suit by or against the sheriff where

his return to a writ or proceeding as a ministerial officer is made the ground of his claim or his defence, his return at most is only considered *prima facie* evidence of its truth."

It follows that the defence set out, if sustained by proof, must be submitted to a jury.

And now, June 1, 1904, the rule for judgment is discharged.

PATRICK MCGRATH VS. JACOB CAHILL.

The lease of a hotel property between A and B contained a clause of amicable action of ejectment. A *habere facias possessionem* was issued to oust B, who then asked to have the judgment opened, alleging that he had an option of purchase.

Held, that as the contract, as alleged, was in parol, B could not in this manner enforce a contract for the sale of the land.

His possession as tenant was not the possession required by the law, and as he had paid no part of the purchase money, or made any improvements, he could be compen sated in damages.

RULE to open judgment. No. 56, June T., 1904.

Larzelere, Gibson & Fox, Esqs., for plaintiff.

Henry Freedley, Esq., for defendant.

Opinion of the court by WEAND, J., July 7, 1904.

A *habere facias possessionem* was issued to oust defendant from the possession of a hotel property owned by plaintiff; and defendant asks to have the judgment opened, alleging that he entered into possession under a parol agreement that he was to have an option to purchase at a certain figure, and in the meantime pay rent. The lease contains an agreement for an amicable action of ejectment. The defendant further alleges that plaintiff has sold the property to another person at the same price he (defendant) was and is now willing to pay for it. The contract, if any, was in parol, and the statute of frauds and perjuries defeats any claim for the land itself. There is nothing upon which to base a decree for specific performance except possession taken under a lease, no purchase money having been paid or improvements made.

The contract as set forth in the petition was "he should have the preference of purchasing the place, etc., if he, the said McGrath, could not find a purchaser for the same at a greater figure; and

pending his said efforts to sell, to wit, until May 1, 1904, he should have the use of the hotel portion of said property at a rental of $75 per month." What constituted the "hotel portion" is not stated The defendant's testimony is somewhat at variance with the statement of the agreement in the petition.

The lease was extended to June 1, 1904.

Defendant only was entitled to and only has possession of the hotel, and this also as tenant. "It is well settled, to take the case of a parol sale of land out of the statute of frauds the vendee must also take actual, open, notorious, exclusive and continuous possession of the premises, in pursuance of the contract; and when the whole purchase money has not been paid, he must have made such improvements thereon as can not reasonably be compensated in damages": Hart vs. Carroll, 85 Pa., 508; Miller vs. Zufall, 113 Pa., 317.

By this proceeding defendant is endeavoring in effect to enforce a parol contract for the sale of lands. Possession alone is not sufficient, for this admits of compensation: Moore vs. Small, 19 Pa., 461; and where there is nothing but possession to sustain the contract damages alone can be claimed, and a chancellor will not enforce specific performance.

"If a vendor breaks a parol contract to convey, in the absence of fraud he can only be called upon to compensate the vendee for the actual loss sustained, such as the payment of money and expenditures and expenses incurred on the faith of the bargain, and is not liable for the value of the vendee's bargain": Molly vs. Ulrich, 133 Pa., 41.

In his petition defendant does not claim that the contract was to be reduced to writing, but merely that he thought the lease would contain the whole contract as understood by him.

We have thus far considered the case upon the facts alleged in the petition; but the testimony fails to disclose any contract as claimed. Defendant's own version is that under certain conditions he was to have a "preference"; but no terms of payment are mentioned, no description of property, nor any of the essential facts to constitute a binding bargain. It is a fact that the subject of his becoming a purchaser was talked of between defendant and Patrick McGrath, but the effect was not to constitute a bargain of sale. The defendant's version is in direct conflict with the testimony of Mr. McGrath. There is no competent evidence to show that anything

was omitted from the lease, or that it ever was contemplated that any agreement of purchase should be reduced to writing; and we are also of opinion that the evidence of Mr. Bergey and others show that Cahill refused to take the hotel when he was offered the opportunity, and is thus estopped.

And now, July 7, 1904, the rule is discharged.

WALTER P. MCCLURE VS MCMICHAEL & WILDMAN MANUFACTURING COMPANY.

Plaintiff was employed as agent to sell knitting machines manufactured by the defendant company. Another company made "stop motions," which were used with defendant's machines but not a necessary part thereof. When plaintiff received an order for a knitting machine it would often be accompanied by an order for a "stop motion," which was sent by defendant. Plaintiff claimed commissions on both of the machines. *Held*, that his only employment was to sell knitting machines, and that he could not claim commissions on the "stop motions."

A machine was sold and an old one taken as part pay. *Held*, that plaintiff was entitled to commission on the price of the new machine.

ASSUMPSIT. No. 39, March T., 1902.

Evans, Holland & Dettra, Esqs., for plaintiff.

Hillegass & Larzelere, Esqs., for defendant.

Opinion of the court by WEAND, J., July 13, 1904.

HISTORY OF THE CASE.

Plaintiff has brought suit to recover commissions on sales of knitting machines manufactured by defendant company. The case was submitted to the court for a hearing without the intervention of a jury.

The defence was made that certain sales charged for were not made; that overcharges were claimed; and that plaintiff was not entitled to commissions on sales of "stop motions," being a machine made by another party, and generally used in connection with the defendant's machine.

FINDINGS OF FACT.

1. The defendant company is a corporation engaged in the manufacture and sale of knitting machines.

2. Plaintiff was recognized as their agent in the sale of the said

machines, and, except under special circumstances, was entitled to a commission of ten per centum on the price realized by sale.

3. The Crawford Manufacturing Company manufactured a "stop motion" machine, which is generally used in connection with the McMichael & Wildman knitting machine.

4. Prior to 1897 or 1898, when plaintiff sold a stop motion in connection with the defendant's machine he acted for the Crawford company, and received from them a commission of ten per centum.

5. About March, 1899, or before 1897, the Crawford company refused to supply any more stop motions except on orders coming through the defendant company, who were to assume all accounts, and on which they were to be allowed ten per centum discount, "bills payable in thirty days"; and after that time all orders to the Crawford company came through the defendant company when ordered with defendant's machines.

6. Plaintiff had no written or verbal contract with the defendant to pay him any per centum commission on sales of stop motions, but understood he was to get ten per centum. No commissions were paid plaintiff by defendant on this account, and he made no demand on said account until six or eight months after the new arrangement was made, and was then informed that he would not be allowed any commission on such sales.

7. Plaintiff claims $200 commissions on sales of stop motions to the value of $20,000. Admitting that this amount was sold, we find that plaintiff is not entitled to commissions on such sales, and that defendant never agreed to pay him for such sales.

8. One hundred and fifty-two dollars is a claim for machines sold the Shaw Stocking Company. (Item 5 in statement.) This claim is not allowed. The company was an old customer, not procured by plaintiff, and he divided his commissions with them.

9. On the sale to the Newville Knitting Company defendant was induced to sell by reason of plaintiff agreeing to accept five per centum commission, and this he has received. He is not entitled to any part of this item.

10. An order was sent for ten machines for the Credential Manufacturing Company, but only two were ever delivered. Plaintiff's claim for commission on the eight machines is not allowed, as the sale on this order was never completed.

11. On machines sold to the Union Underwear Company there is admittedly a balance due plaintiff of $32.62.

12. A "head" was sold to the Credential Manufacturing Company, on which a commission of $6 is claimed, it being an integral and largest part of the machine. The plaintiff is entitled to the $6 commission.

13. On Item No. 15 in statement, machines sold Northwestern Company and others taken in exchange, plaintiff is entitled to $30.

14. Item 18. Cardingham matter admitted to have been paid.

15. Item 23. On sales to Wahneta Mill Company the plaintiff is not entitled to recover, no such sales made by him having been shown.

16. Item 14. Sales to Wilcox admitted to have been paid.

17. Item No. 3 contains a charge of $7.62 commissions on stop motions not delivered by defendant, and the p'aintiff has no claim on this account.

CONCLUSIONS OF LAW.

As a result, on review of the testimony I find that plaintiff has only by competent proof established a claim to the extent of $68.62, with interest from September 23, 1900.

REASONS IN SUPPORT OF CONCLUSIONS.

After considerable testimony had been taken, plaintiff, on page 40 of notes, specified in detail the various sales or transactions on which he claimed commissions, and the court has in its findings confined itself to these items alone.

The burden of proof rested with plaintiff; and where I have disallowed any particular claim it is because his evidence failed to bear him out or the law was against him.

On stop motions he was not allowed commissions because he has entirely failed to show any agreement by which he was entitled to be paid.

On page 48 the plaintiff testified: "Q. Did you agree upon any amount that you were to be paid? A. No, sir. I always understood I was to get ten per centum."

On page 52: "Q. And didn't Mr. Wildman tell you because they were compelled to guarantee sales—in other words, were responsible for these stop motions, and would frequently be obliged to pay for them long before they got the money from the debtors—

that therefore you would not be allowed any commissions on stop motions? A. He told me something like that six or eight months after the change had been made. I guess probably it was a year or more when I commenced to claim the back commissions"

This testimony of plaintiff, taken in connection with his failure to claim commissions for so long a period, and the evidence of Mr. Wildman and Mr. Coleman, causes me to reject the claim. Plaintiff was employed to sell knitting machines. Stop motions were not an absolute necessity to the machine, and the defendant company only sold them as an accompaniment when desired, although no doubt their utility facilitated the sale of the knitting machine.

The refusal of the claim of $152 on machines sold to the Shaw Stocking Company is based on the fact that the company was an old customer, using defendant's machines, and had not originally been procured by him. The testimony shows that he had been cautioned about sales to established customers. He also divided his commissions with them, which was in bad faith, for it gave a reduced price to the machine When others would hear of it and wanted to buy direct, or when the Shaw company desired to do so, they could cite this as a case of reduced price.

On Item 9 the conclusion is based on plaintiff's agreement to accept five per centum commission

On Item 1 in statement the refusal is based on the evidence that only two machines were furnished on the order. The plaintiff failed to show a delivery of more than two machines, and defendant's books show this to be the fact.

The allowance of $6 for the head is proper. It was not strictly a part of a machine, but a substantial whole. If defendant's construction is correct, the absence of any part, bolt, screw, etc., would deprive the plaintiff of his commission. He does not claim for a "part," as strictly understood.

Item 13 is allowed because the transaction was a sale, notwithstanding that other machines were taken in exchange. It was only a change in method of payment; and if plaintiff sold the machines, he ought not to be deprived of commissions because the defendant did not demand cash.

Item 23. Wahneta sale is disallowed, as the evidence does not show that the sales were made by plaintiff, and Wade's testimony is

incompetent. Plaintiff had nothing to do with the sale, and sent in no order. (See his testimony on page 76 of notes.)

Item 3 contains a charge of $7.62 on stop motions not delivered.

VERDICT.

And now, July 13, 1904, the court renders a verdict in favor of the plaintiff for $68 62, with interest from September 23, 1900, and costs; and unless exceptions are filed within the time limited by law, the prothonotary will enter judgment accordingly.

Orphans Court of Montgomery County.

ESTATE OF LOUIS C. VANUXEM, DECEASED.

While lands situate in another state, and which a decedent domiciled in Pennsylvania died seized of, are not subject to collateral inheritance tax, yet if, under his will, there be an absolute necessity to sell the lands to carry out its provisions, an equitable conversion into personalty takes place, the proceeds come into this state for distribution and are liable to the tax.

APPEAL of executors and legatees from the assessment of collateral inheritance tax.

J. A. Strassburger, Esq., for commonwealth.

N. H. Larzelere, Esq., for appellants.

Opinion of the court by SOLLY, P. J., July 21, 1904.

Louis C. Vanuxem, a resident of the township of Springfield, this county, died therein on the 21st day of December, 1903, unmarried and testate, leaving no lineal descendants. His will is dated October 16, 1902, and has several codicils attached.

In the third item he gives general pecuniary legacies to the amount of $570,500, without deduction for taxes or like charges (which are to be paid out of the general estate), to his sisters, nieces, and other relatives and persons, payments to be made to them in the order named.

In the fourth item the testator gives to his sisters, Mary and Florence, during their lives and the life of the survivor, the full and

Vanuxem's Estate.

free use and occupancy as a home for themselves and any of his sisters who may become widowed, his dwelling on Evergreen avenue, Chestnut Hill, and his plantation at Upatoi, Georgia, together with all household goods, furniture, horses, carriages, etc., at either place, on condition that they maintain the houses in good order, pay taxes and like charges, with the right to rent the premises for their benefit should they not desire to occupy either.

Upon the death of the survivor the executors are directed to sell the properties, the proceeds of which shall pass into the residuary estate, which is devised and bequeathed in Item 5 to and among certain persons and corporations share and share alike, with the provision that in the event of the death of either of two of his brothers-in-law in the life-time of the testator, leaving his wife surviving, she shall be substituted as residuary legatee in place of her husband; and should both husband and wife predecease him, leaving issue surviving, such issue shall take the share of their father or mother.

By the third codicil, which is dated June 9, 1903, a pecuniary legacy of $50,000 is bequeathed to Louis Vanuxem Cochran, a nephew. The residuary clause of the will is amended and radically changed. In lieu of the devise and bequest of equal shares of the residue of the estate to the persons named in that clause, there are general pecuniary legacies of $10,000 each bequeathed to James B. Walter, John Scott, Jr., and Gustav H. Seelus, and $25,000 each to the trustees of Princeton University and the trustees of Jefferson Medical College. The interests of his sisters, Mary and Florence Vanuxem, and his brothers-in-law, William Potter, John Lewis Cochran and Daniel L. Hebard, are to remain as devised and bequeathed in the residuary clause. They are, therefore, the residuary devisees and legatees of the estate.

The language of the seventh item of the will, in part, is as follows: "I give unto my executors, hereinafter named, full power and discretion to sell any or all of my real estate whenever any such sale be necessary or expedient for any purpose of my estate, of administration, distribution or otherwise."

At the time of his death the testator was possessed of personalty consisting of bonds, stocks, mortgages, notes, insurance policies, cash, etc., all of the value of about $460,000, as fixed by the appraiser of the collateral inheritance tax. His debts amounted in

round figures to $140,000. The general pecuniary legacies bequeathed in the will and codicils foot up about $700,000.

He was seized in fee simple of certain real estate in Pennsylvania, Georgia, Tennessee and Illinois, a detailed statement of which, as well as the personal assets, with values, appears in the inventory and appraisement made up and filed by the collateral appraiser. Upon the real estate situated in the city of Knoxville he assessed the tax due at $1,350.13, and upon that in the city of Chicago at $6,741.82. He assessed no tax on the real estate at Upatoi, Georgia, because in his opinion it is not liable.

His action is based upon the conclusion that there is an equitable conversion of the real estate, because there is not only an absolute necessity to sell the same to execute the will but also such a blending of the real and personal estate by the testator as to show his intention to bequeath the fund arising out of the same as money. He cites a number of authorities to support the assessment of the tax on the Tennessee and Illinois lands. The executors and legatees have taken this appeal from the assessment of these lands. Their contention is that these lands pass as real estate to the legatees, there being no equitable conversion under the will.

The act of May 6, 1887, P. L. 79, provides that all estates, real, personal and mixed, of every kind whatsoever, situated within this state, whether the person or persons dying seized thereof be domiciled within or out of this state, and all such estates situated in another state, territory or country, when the person or persons dying seized thereof shall have their domicile within this commonwealth, which passes to collaterals, shall be subject to the payment of collateral inheritance tax. The tax imposed is not a succession duty on the recipient of the property, but is a tax upon the property itself, as appears from the second proviso in the third section, that it shall remain a lien on the real estate on which the same is chargeable until paid. When the Legislature undertook to impose such tax upon real estate situate in another state, it transcended the power of the state: Bittenger's Estate, 129 Pa., 338; Drayton's Appeal, 61 Pa., 172; Commonwealth vs. Coleman's Administrator, 52 Pa., 468. "The border line, however, is reached when property which is in fact real estate is to be treated as personalty under the doctrine of equitable conversion": Handley's Estate, 181 Pa., 339.

Is there an equitable conversion of the lands situated in Knox-

ville and Chicago? If there is not, then they are not subject to the tax, for the "state can not exercise extra territorial taxing power." If there is a conversion, then they are liable, and the action of the appraiser must be sustained.

Conversion is always a question of intent. The intent of a testator is to be gathered from his entire will rather than from the terms of a particular devise, which regarded alone might be inconsistent with the testamentary scheme as a whole: Dean vs. Winton, 150 Pa., 227.

In Hunt and Lehman's Appeals, 105 Pa., 128, Mr. Justice Paxson said: "It ought to be settled by this time that in order to work a conversion there must be either, first, a positive direction to sell; or second, an absolute necessity to sell in order to execute the will; or third, such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate and to bequeath the said fund as money. In each of the two latter cases an intent to convert will be implied." This case has been cited and the language of Justice Paxson approvingly quoted again and again by the appellate courts. Among instances are Irwin vs. Patchen, 164 Pa., 51; Sauerbier's Estate, 202 Pa., 187; Rauch's Estate, 21 Sup. Ct., 67.

Mr. Justice Mitchell in the late case of Yerkes vs. Yerkes, 200 Pa., 423, says: "The doctrine of equitable conversion is based on the rule that what is to be, or ought to be, done shall be treated as if done already. It is a fiction, therefore, invented to sustain and carry out the intention of the testator or settler, never to defeat it. Its application requires constant watchfulness to guard against the tendency to become a formal rule *de jure* without regard to its real purpose and necessity. It should never be overlooked that there is no real conversion—the property remains all the time in fact realty or personalty, as it was; but for the purpose of the will it may be necessary, and only so far it is treated in contemplation of law as if it had been converted. Few testators have any knowledge of the doctrine or any actual intent to change the nature of their property, except when and to the extent that may be required to carry out the special purpose of the will. The presumption, therefore, no matter what the form of words used, is always against conversion; and even where it is required it must be kept within the limits of actual necessity."

But conversion will take place, though the language confers a mere discretionary power of sale, where it is not possible to execute certain provisions of the will without a sale of the real and personal property into money. "If a testator authorizes his executors to sell his real estate and to execute and deliver to the purchasers deeds in fee simple, and it is clear from the face of his will that it was his intention that the power so conferred by him should be exercised, it will be construed as a direction to sell, and operate as an equitable conversion. If in addition to this clear intention of the testator it plainly appears that effect can not be given to material provisions of the will without the exercise of this power, the conclusion is irresistible that a conversion is as effectually accomplished by the will, and that the duties of the executors under it are the same as if it contained a positive direction to sell": Fahnestock vs. Fahnestock, 152 Pa., 56.

With these authoritative explanations of the doctrine of equitable conversion as applied in Pennsylvania, we turn to the will of the testator to ascertain his intent and his scheme of distribution. In brief, he gives general pecuniary legacies upwards of $700,000; devises certain of his real estate to two of his sisters for life, and at their death directs a sale by the executors; and devises and bequeaths the residue of his estate to his two sisters and three brothers-in-law. Whenever it is necessary or expedient for any purpose of the estate, of administration, distribution or otherwise, the executors are given full power and discretion to sell any or all the real estate. The pecuniary legacies are to be paid before those to whom the residuary is given shall receive anything, because it is only what remains of the estate after the specific legacies are paid that passes as residue or remainder. These legacies pass to the legatees as money. The testator intended them to be paid in cash. There is nothing in the language of the will to show that they are to be paid in any other way. Their character is personalty. He must have foreseen the necessity for a sale of his real estate to carry out his scheme of dividing his estate by first bestowing gifts on the beneficiaries in the form of pecuniary legacies, else how were they to be paid? He therefore gives his executors full power to sell the real estate whenever a sale is necessary for any purpose of the estate, of administration, distribution or otherwise. It is true the power is discretionary, not direct and positive, but the intent is manifest that

it is to be exercised if the purposes of distribution require it. The power, therefore, is to be construed as a direction to sell.

The last codicil to the will was executed June 9, 1903, less than seven months before testator's death. It will be observed that he bequeaths $80,000 in pecuniary legacies to certain legatees who were included in the residuary clause of the will, thus giving them preference over the remaining residuary legatees. This amount, together with the legacies given in the will, made money gifts aggregating nearly $700,000, or several hundred thousand dollars more than his personal estate was then worth. The testator is presumed to have known the value of his personal estate at that time. He undoubtedly knew the extent of his gifts, and it would be passing strange if he intended their payment to be confined to the proceeds of the personal estate, resulting in each legatee receiving much less than the amount of the gift. The manifest intention of the testator is to first give legacies of different amounts, and what is left of the estate to five residuary legatees. The latter take what remains of the estate after the legacies have been first paid and satisfied thereout. "A residuary clause in a will is a gift of all that is left after the gifts specified or designated have been paid and satisfied." (Per Penrose, J., in Wood's Estate, 13 Dist. Rep., 195.) It may be said the testator blended his real and personal estate, and authorized a sale of the former by the executors when in their discretion the purpose of distribution required it. But there can be no shadow of doubt that in order to execute the will, carry out the provisions, and pay the general pecuniary legacies, it is absolutely necessary to sell the real estate. Effect can not be given to the will without the exercise of the power of sale. For the purpose of administration and distribution the proceeds of the lands must come into this court. It follows that an equitable conversion is as effectually accomplished by the will, and the duties of the executors under it are the same as if it contained a positive direction to sell. In reaching this conclusion the injunction of Yerkes vs. Yerkes, *supra*, to "keep within the limits of actual necessity" is observed.

Although the tax is assessed by the appraiser upon the value of the lands situate in foreign states, it is really upon the proceeds to be brought here for distribution. In strictness it is the legacies themselves that are subject to the tax. General pecuniary legacies pass to the leagtees only in the form of money. If real estate should

be conveyed to such legatees in satisfaction of their legacies, it would only be as a substituted equivalent for the pecuniary sum of the legacies: Miller vs. Commonwealth, 111 Pa., 321.

It is immaterial to this inquiry what the statutes of the states of Illinois and Tennessee are on the subject of collateral inheritance tax on lands within their jurisdiction owned by one dying domiciled in another state. Whether lands of this decedent situated in those states are liable to pay such tax or succession duty can not affect the question before us. If there is an equitable conversion of the lands into personalty under the will of the decedent, and the proceeds are brought into this court for distribution among collaterals, the legacies payable out of such proceeds are liable for the collateral inheritance.

From what has been said it follows that the action of the appraiser must be sustained. In our view there is such an absolute necessity to sell the lands in the states of Illinois and Tennessee and convert them into money, in order to pay general pecuniary legacies and carry out the intent of the testator and the provisions of his will, as to work an equitable conversion into personalty, the proceeds of which sales must be brought into this court for distribution.

And now, July 21, 1904, appeal dismissed at costs of appellants

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Court of Common Pleas of Montgomery County.

MARTHA M. JARRETT VS. ARTHUR H. WALSH.

The act of June 4, 1901, P. L 357, does not authorize the court to make distribution of the sheriff's proceeds of sale. The method of procedure is a rule to pay the money into court, or an application for an issue. The application should set out the reasons for a rule or an issue, as pointed out in Moore vs. Dunn, 147 Pa., 359.

Where a person holds an insurance policy as collateral security for a mortgage debt, he is not obliged to take the fire loss paid by the insurance company as payment on account of his mortgage debt. A person may, if he chooses, relinquish a collateral security altogether without the consent of other creditors of his debtor. It is a matter resting entirely between him and his debtor, with which others have nothing to do.

EXCEPTIONS to sheriff's distribution of proceeds of sale. No 30, March T., 1904.

Jarrett vs. Walsh.

Samuel H. High, Esq., for plaintiff.

John Faber Miller, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., July 1, 1904.

The plaintiff foreclosed her mortgage and the sheriff sold the property to one Henry W. Hallowell. The entire proceeds of sale are in the sheriff's hands.

The plaintiff's mortgage is the first lien of record, and the distribution filed by the sheriff shows that the mortgage and its interest will exhaust the fund in the hands of the sheriff. The balance for the next lien is but two dollars and nineteen cents.

Charles F. Felin filed exceptions to the sheriff's distribution. Mr. Felin holds the third lien and two mechanic's claims which follow his judgment.

The exceptions state that the mortgage of Miss Jarrett was fully paid before the 24th day of February, 1904, the day upon which the sheriff made his distribution. These exceptions are sworn to by one Amos Y. Lesher, who says he is a business associate of Mr. Felin. He says he believes there are good reasons for contesting the right of Miss Jarrett to receive the money distributed to her. He also declares that Mr. Felin is now in California, and has been in said state since January 20, 1904.

There is no application to pay the money into court, nor is there any prayer for the appointment of an auditor to distribute the proceeds of sale or for an issue to determine the validity of Miss Jarrett's lien. There is no intimation in the exception how the alleged payment was made. We have the simple declaration that the mortgage was fully paid before February 24, 1904.

The act of June 4, 1901, P. L. 357, under which the sheriff made his return, does not authorize the court to make distribution. The act declares that "the court shall proceed and determine the same as now provided by law in case of disputes as to the distribution of the proceeds of sheriff's sales." The method of procedure is set out in Moore vs. Dunn & Fell, 147 Pa., 359, and in People's Savings Bank vs. Mosier, 199 Pa., 375. The exceptant should ask for a rule to pay the money into court and for an auditor or for an issue to test the validity of the lien. The application should set out the reasons for a rule. If the facts alleged in the petition for the rule are denied by the holder of the mortgage, depositions may be taken,

and on them the court will determine whether an issue shall be granted.

The allegation in the exceptions that the mortgage was paid is not sufficient to award an issue.

While the case is not before us in the form prescribed by the act of April 20, 1846, P. L. 411, an examination of the depositions satisfies us that no ground for an issue or an auditor is disclosed.

Miss Jarrett held the insurance policy as an additional security for her debt. The clause in the policy which gave her an interest in the loss that might be paid was a collateral security to her debt. When the fire occurred she was under no obligation to demand the money in the hands of the insurance company due for the loss. She did not receive it. The check was drawn to the order of herself and Mr. Walsh, the owner. This, no doubt, was done for the protection of the insurance company. She did not give any directions to have it drawn in that way. The money was received by Mr. Walsh, the owner, and he exercised full control over the fund. Where a person holds several securities we are not aware that the giving up of one satisfies the debt where there is no intent on the part of the debtor or creditor to give such effect to the release of the security. Even if Miss Jarrett had given a direction to use the money in restoring her mortgage security, we do not see how such direction could be treated as payment of the mortgage. This was one of the rights secured to her by the clause in the policy, and no doubt she took the policy for that very purpose—to wit, to secure the continued value of the mortgaged premises. But there is no evidence that she exercised any such control over the insurance money.

She gave up any claim she had to the insurance money, and allowed the owner to receive the fund as his own. She relinquished a collateral security. "A person may, if he chooses, relinquish a collateral security altogether without the consent of other creditors of his debtor. It is a matter resting entirely between him and his debtor, with which others have nothing to do": Dyott's Estate, 2 W. & S., 490; Jennings vs. Loeffler, 184 Pa., 318.

We therefore decline to interfere with the sheriff's distribution. First, because there is no proper proceeding before us for an issue; and secondly, because the depositions offered before us do not show that there is any material fact in dispute. The plaintiff's mortgage was not paid off before the sale by the sheriff.

IN EQUITY.

JOHN S. MOREY, JR., vs. HOWARD BLACK AND CHARLES ALLEN.

A preliminary injunction will be awarded restraining the operation of a bowling-alley during the hours of the night ordinarily given to sleep and rest, where the complainants show that the noises of the alley prevent sleep in the neighborhood by reason of the shaking of the houses and the vibrations of the beds and chairs.

APPLICATION for a preliminary injunction. No. 6, March T., 1904.

E. L. Hallman, Esq., for plaintiff.

Jacob V. Gotwalts and *Henry Freedley, Esqs.*, for defendants.

Opinion of the court by SWARTZ, P. J., June 6, 1904.

The plaintiff is the owner of a property fronting on Main street, in the borough of Royersford. He occupies the building as a drug-store and dwelling. The family consists of his wife and himself. He also owns the premises immediately to the west of his drug-store. This building is occupied by Miss Van Pelt as a store and dwelling. The upper story is used for offices.

The defendants erected a bowling-alley immediately to the eaat of the plaintiff's drug-store. The alley is a one-story frame building, having a brick front. The width is twenty-four feet and the depth one hundred feet. The building rests on piers. The open space under the front part of the building is three feet, and decreases as the building extends back. At the rear the bottom of structure is level with the ground. There are two windows next to plaintiff's property, and the distance between the drug-store and the rear of the bowling-alley is but thirty-seven inches. The alley is used for bowling from about nine in the morning until twelve o'clock midnight. At the opening evening it was kept in operation until two o'clock in the morning. There are three alleys in the building, and the noise is so loud when the balls strike the pins that it is heard three squares away from the alley. The rumbling noise, as the balls roll over the alleys, sounds like distant thunder. The sharp noise as the balls strike the pins and knock them down is the loudest, and is heard distinctly at the distance of three squares from the alley. The noises cause vibrations in the plaintiff's building. The windows rattle; the beds and chairs shake from these vibrations and rumbling sounds. Even in Miss Van Pelt's back building the noise shakes the bed and windows as well as the house itself. In

the office above her store the noise interferes with conversation. This evidence is not contradicted, although other witnesses testify that they live in the neighborhood, and hear the noise—that it is loud, but does not disturb them now because they have become accustomed to it.

The plaintiff is sick, and suffers from nervous debility. He can not sleep in his house, but is compelled to spend his nights at his father's dwelling. Miss Van Pelt finds the sounds so annoying that she will give up her lease unless there is a change. The alley was in operation about two weeks when the plaintiff filed his bill.

The defendants spent about three thousand dollars in the construction of the building and its furnishings. The bowling-alley is located in a business section of the town. The testimony shows, however, that these store buildings are used also in part as dwellings. The maintenance of a bowling alley is not a nuisance *per se*. It is a lawful business if properly conducted and not carried on at unseasonable hours. We shall not pass upon the question whether the building is properly constructed so as to give no unnecessary annoyance to the neighbors. The evidence upon this inquiry may be so conflicting as to require an action at law to determine whether the alley as constructed and operated is a nuisance. If the plaintiff must submit to these disturbing noises—to the shaking of his buildings and the vibration of his chairs and beds—during the day and evening, we are satisfied that the defendants have no right to subject the plaintiff to these annoyances during the hours ordinarily given to sleep and rest. There is not a particle of evidence to show any necessity for operating the alleys until midnight. It may be more profitable, but that does not show a necessity to deprive a neighbor of the sleep he is entitled to enjoy in his house. A lawful business must be carried on at seasonable hours.

There are some occupations that require services during the night, but we are not aware that a bowling-alley falls within that class. The very fact that it is conducted all day long indicates that the business is not necessarily a night occupation. We think that the case clearly is ruled by Dennis vs. Eckhardt, 3 Grant, 390. In that case the defendant, a tinsmith and sheet-iron worker, carried on his business close to the complainant's sleeping-rooms. The hammering began before daylight. During the day-time the defendant was employed elsewhere, and resumed his noise in his shop at eight

o'clock in the evening and continued his hammering until eleven o'clock. The complainant and his family could scarcely hear each other converse, and were often obliged to abandon their bed-rooms next to the shop. Every night and morning they were deprived of their rest by the persistent hammering of the defendant. The court held that the noises emanating from defendant's shop at unseasonable hours constituted a nuisance, and a preliminary injunction was awarded restraining the defendant from disturbing the quiet and repose of the plaintiff and his family.

So far as necessity is concerned the tinsmith has a stronger claim for midnight operations than the manager of a bowling-alley. The one conducts a mechanical trade; the other furnishes a place of amusement.

We fail to see any justification for the operation of defendant's bowling-alley from half-past ten o'clock in the evening until seven o'clock in the morning, when the evidence shows that a person enjoying good health, like Miss Van Pelt, is disturbed by the shaking of her bed and by the vibrations from the rumbling and excessive noises. The defendants have no right to drive their neighbors from their houses to obtain sleep.

A preliminary injunction is accordingly awarded restraining the defendants, their agents, workmen and employes, from operating the said bowling-alley, as now conducted, between the hours of half-past ten o'clock in the evening and seven o'clock in the morning on any night until the further order of the court. The plaintiff will enter bond in $500 before the injunction issues.

MARY E. FITZPATRICK VS. JOSEPH W. HUNTER.

Fraudulent conveyances, under and subject to existing incumbrances, evidence of fraud when sufficient to go to a jury.

It is competent to prove by parol a greater consideration than that nominated in the deed. In determining whether the consideration was inadequate, and therefore fraudulent, a judgment subject to the payment of which the grantee takes title must be considered as part of the consideration. If the grantee fails to pay the judgment, the grantor may call upon him for indemnity to the value of the land conveyed under the deed in question. Where there is an actual debt the jury can not be permitted to infer a fraudulent intent by the mere fact of payment or preference given.

Fitzpatrick vs. Hunter.

A conveyance to a creditor subject to the payment of fixed liens on the real estate is not fraudulent, nor is it an assignment for the benefit of creditors where the grantor intends to part with all his interest.

Where a fraudulent grantee gives back to the grantor all that was received by the conveyance, the first conveyance will not taint a second grant made to a new party when such second conveyance is without fraud in law or in fact.

Henry M. Tracy, Esq., for plaintiff.

Evans, Holland & Dettra and *N. H. Larzelere, Esqs.*, for defendant.

MOTION and reasons for a new trial. No. 68, March T., 1903.

Opinion of the court by SWARTZ, P. J., May 27, 1904.

The plaintiff brought an action of ejectment to recover the possession of a tract of land, situate in Abington township, Montgomery county. She claims title through a deed from the sheriff, under execution process against M. Josephine Bing. The defendant holds a prior deed. M. Josephine Bing sold to her mother, Mrs. Burke, on January 13, 1902, and the mother conveyed the property to the defendant on February 13, 1902.

The judgment under which the property was sold to the plaintiff became a lien, if at all, on Mrs. Bing's property, February 20, 1902—that is, one week after the defendant obtained title and one month after Mrs. Bing conveyed to her mother.

The plaintiff contends that the conveyances to the mother and to Mr. Hunter were fraudulent as against existing creditors of Mrs. Bing. She charges, first, that Mrs. Bing was insolvent and sold for an inadequate price; secondly, that the sale was made with intent to hinder and delay the plaintiff in the collection of her claim or debt; thirdly, that the defendant gave as a consideration for the conveyance to himself a judgment confessed by Mrs. Bing, which was nine thousand dollars in excess of the actual sum due to the defendant from Mrs. Bing.

It is also alleged on behalf of the plaintiff that Mrs. Bing and the defendant caused the conveyance to be made to Mrs. Burke without communicating to her that the property was subject to a judgment of twenty thousand dollars, held by the defendant, and that Mrs. Burke believed she was buying for a consideration of eight thousand dollars, that being the money due her for cash loaned to her daughter, Mrs. Bing.

It is further claimed that Mr. Hunter, the defendant, did not

give as a consideration for the deed to himself the judgment of twenty thousand dollars, but that he still holds the same as a subsisting claim against Mrs. Bing, or that Mr. Evans, his assignee, so holds it.

In the deed from Mrs. Bing to her mother, Mrs. Burke, the consideration named is one thousand dollars, with the following recital in the *habendum:* "Subject to the payment of a judgment debt or principal sum of twenty thousand dollars, together with interest thereon as the same shall hereafter become due and payable, and also under and subject to all other debts of record."

Mrs. Burke offered to show that the consideration was eight thousand, and not one thousand; that the daughter owed her that sum and made the conveyance in satisfaction of the debt. We allowed the evidence; and in this, we think, there was no error. "It is competent to prove by parol a greater consideration than that nominated in the deed": Henry vs. Zurflieh, 203 Pa., 440. In that case the consideration named was $2,500; proof was allowed to show that the real consideration was $4,500, made up in part by a debt due from the grantor to the grantee. To the same effect is McGary vs. McDermott, 207 Pa., 620.

It is argued that the under and subject clause can not be regarded as part of the consideration, and that therefore the consideration is so inadequate as to make the deed fraudulent. United States vs. Mertz, 2 Watts, 406, is cited in support of this doctrine. It must be noted that it does not appear in that case that the son purchased from the father under and subject to the existing incumbrances. The deed was made in consideration of wages alleged to be due to the son. The court say, "It has not been pretended that the sum agreed to be paid by the son was a full consideration; but as the property was incumbered to the value of the unpaid residue, the court expressed an opinion that the payment of the incumbrances might be taken for a part of the consideration. And so indeed it might, if the son had agreed to pay them either out of the property or out of his own pocket." In the case before us, Mrs. Burke took the property "subject to the payment of a judgment debt of twenty thousand dollars." By this clause the grantee, Mrs. Burke, assumed no personal liability to pay the judgment; but she did agree to discharge the lien of the incumbrance by payment, or in default thereof that the land should remain liable therefor to the

extent of its actual value. If she failed to keep her covenant, Mrs. Bing, the vendor, could call upon her for indemnity to the value of the land conveyed under the deed in question: Blood, Executor, vs. Crew Levick Company, 171 Pa., 328. There was no fraud against Mrs. Bing's creditors, for this twenty thousand judgment was paid, or so much thereof as the land is able to pay. The creditors can ask no more. If the property, as testified to, was worth no more than $20,000, Mrs. Bing had a perfect right to use it in payment of her debt of a like amount.

But it said the mother was deceived by Mrs. Bing and the defendant when she took the property in consideration of her claim of $8,000 and the assumption of a further debt of $20,000. Mrs. Bing, by the conveyance, paid her mother $8,000, and the land conveyed was to pay $20,000 in addition. She obtained a real consideration of $28,000 for a property worth but $20,000. How can this be a fraud upon creditors, so far as consideration is concerned? If the plaintiff's contention is correct, the fraud was against the mother, if she in fact thought she was paying but $8,000.

If, however, this conveyance was part of a scheme to vest the title in a third person in order to hinder and delay creditors, then it was fraudulent, even if the consideration was more than adequate. Still, if Mrs. Burke paid a full consideration without any knowledge of an intended fraud on the part of her daughter, her title is good, even if she knew the daughter was insolvent when the deed was executed. A *bona fide* purchaser from one indebted is not affected by a fraudulent intent on the part of the grantor, of which he had no notice: Reehling vs. Byers, 94 Pa., 316.

We can not assume that the conveyance from the daughter to the mother was fraudulent without evidence showing fraud. Fraud must be established, either by direct proof or by facts, to warrant a presumption of its existence clearly proved. . . . . It is not enough to charge fraud, and prove in support thereof slight circumstances of suspicion only. To be of any avail, it must be clearly proved: Jones vs. Lewis, 148 Pa., 234.

Suit was brought against Mrs. Bing, and before judgment was obtained against her she conveyed her property to her mother for a full consideration. If the property conveyed was sufficient to pay the mother and the twenty thousand dollars, then, under the evidence, Mrs. Bing was not even insolvent, for the personal property

that was afterwards sold realized enough to pay the debt of the plaintiff, if Mrs. Bing had so applied it. The mother, according to her testimony, accepted the property in payment of her claim; and Mr. Hunter says the conveyance to him will pay his judgment, and was accepted in satisfaction of his claim. Where, then, is the evidence of fraud on the part of Mrs. Bing? If the case were submitted to the jury a finding in favor of the plaintiff must be based upon the sole fact that Mrs. Bing made a conveyance of all her real estate at a time when suit was pending against her, and at a time when her other creditors were pressing for their money. No money passed to Mrs. Bing. She sold for full value, and the entire proceeds of sale passed to her creditors. True, at a subsequent date, Mrs. Bing may have sold her personal property in fraud of the plaintiff; but it is not pretended that there is any evidence that Mrs. Bing contemplated any such sale of her personal effects at the time she conveyed to her mother, on January 13, 1902. "Where there is an actual debt the jury can not be permitted to infer a fraudulent intent by the mere fact of payment or preference given": Werner vs. Zierfuss, 162 Pa., 360; Shibler vs. Hartley, 201 Pa., 286. We are not permitted to assign a bad motive to an act which is not wrong in itself, or in its necessary consequences: Covanhovan vs. Hart, 21 Pa., 495. A jury is not at liberty to deduce fraud from that which the law pronounces honest: York County Bank vs. Carter, 38 Pa., 446. In Snayberger vs. Fahl, 195 Pa., 336, the authorities upon the question of fraudulent conveyances are carefully reviewed, especially as to the inquiry whether the evidence of fraud is sufficient to go to the jury. "Where there is payment of an actual debt, there can be no question of fraud in fact for the jury without additional evidence of something which may be considered, either in itself or in its connection with the circumstances, a badge of fraud." The mother swore to the evidence of indebtedness produced, and the daughter corroborated her. There was no controverting testimony upon this point. A conveyance to a creditor, subject to the payment of fixed liens on the real estate, is not fraudulent. Such deed is absolute on its face; and by it the grantor parted with her whole interest, legal and equitable, and no one but the grantee took any interest. It does not create a trust, and is not in effect an assignment for benefit of creditors: Miller vs. Shriver, 197 Pa., 191. Of course an inadequate consideration, where the grantor is insolvent, would present

a different question. Even if the $8,000 consideration to the daughter drops out, the inquiry would arise whether the other considerations named in the deed are not sufficient to support the conveyance. The value of the property is $20,000. If we are in error in holding that the deed to Mrs. Burke is free from any evidence of fraud, then the next inquiry is, Did the defendant purchase from Mrs. Burke for value without notice of the fraud?

The agreement made on February 13, 1902, between Mrs. Bing, Mrs. Burk, Albert J. Burk and Mr. Hunter was cotemporaneous with the conveyance from Mrs. Burke to Mr. Hunter. This contract sets out very distinctly that Mr. Hunter accepted the deed in full payment of his judgment. He declares, "said deed being hereby accepted by me in full payment, settlement and satisfaction for loans of money heretofore made or obtained by me for the said Mrs. M. Josephine Bing, and amounting to $19,993.86, as per statement, dated January 4, 1902, hereto annexed." At the same time he agreed to save harmless Mrs. Burke and her son from any call or demand on certain notes alleged to have been made by them. Mr. Hunter was bound by this contract. The failure to satisfy the judgment, and the assignment of the same to Mr. Evans, did not relieve him from his engagement. Mr. Evans was present when the contract was executed. He was fully aware of its terms, and took the judgment subject to Mr. Hunter's undertaking. At the time the assignment was made, Mr. Evans had no interest in the judgment. He held it for Mr. Hunter. The later transfer, as collateral to secure the payment of $6,000, advanced to Mr. Hunter, is in no better position, so far as any claim against Mrs. Bing is concerned. She is not liable to Mr. Evans on the judgment, because he knew that Mr. Hunter had no claim against her at the time he advanced the money to Mr. Hunter. Mr. Evans must look to the property, or to Mr. Hunter, for repayment.

The arrangement whereby Mr. Hunter protected his judgment was not fraudulent. An act of bankruptcy is not necessarily a fraudulent act. A preference by an insolvent, though honestly given, may constitute an act of bankruptcy; but it is not fraudulent in law or fact. When, therefore, Mr. Hunter protected himself by an effort to avoid a merger of his title and his judgment, such act is no evidence of a fraudulent conveyance.

The allegation that he accepted a judgment for a sum in excess of his claim is not supported by the evidence, as we read it. He furnished some of the money included in the judgment, and the balance was made up of notes, which he guaranteed to the holders. Mrs. Bing received the money; the notes were made in her interest, and she received the proceeds. If she passed over to Mr. Hunter forged paper and received the money thereon, she was liable to him, although her name did not appear on the notes.

We conclude that there is no evidence of fraud on the part of Mr. Hunter that would have justified a submission of the case to the jury.

If Mrs. Bing made the conveyance with intent to defraud the plaintiff, and the mother received the title without knowledge of the fraud and for a full consideration, then the title of Mr. Hunter is good, although he may have been aware of Mrs. Bing's fraudulent intent. Where there is a *bona fide* grantee, a subsequent purchaser from him takes a valid title, although such vendee buys with knowledge of the fraudulent purpose of the original vendor.

Apart from the matters considered, the title of Mr. Hunter is good, even if all the parties participated in a fraud in making title to Mrs. Burke. That contract was rescinded. Mrs. Burke gave up all she received thereunder, and the subsequent conveyance gave Mrs. Bing a new consideration, to wit, a release from all liability on the Hunter judgment of $20,000.

The second conveyance was in fact an abandonment of the first and a new conveyance from Mrs. Bing for a full consideration. Where a conveyance fraudulent as to creditors has been made, if the contract be afterwards rescinded or abandoned and a new conveyance is made free from fraud and for a full consideration, the new transaction purges the fraud: Lynde vs. McGregor, 13 Allen, 172.

And now, May 27, 1904, the reasons for a new trial are dismissed and a new trial is refused.

IN EQUITY.

SHOEMAKER ICE COMPANY VS. LOUIS RUTHERFORD ET AL.

R. entered into the employ of complainant, an ice company, as a driver and salesman; and in his agreement it was stated that he was not to sell any other goods while in its employment or its assigns, and that "when he shall leave the employment of complainants or their assigns he will immediately give to them a full and complete list of all the customers on the said routes with their residences at the time he leaves it; and that he will not thereafter for a space of five years sell, directly or indirectly, any ice, either on the aforesaid routes or any other routes of the party of the first part or their assigns, in the said county of Montgomery, within fifteen miles of Ogontz, but will use his influence and best endeavors to have the customers on said routes continue buying of the party of the first part or their assigns."

His salary was to be ten dollars per week; but during a busy season the complainant paid him twelve dollars per week. R. was also to give two weeks notice of his intention to quit his employment with complainant, who might also discharge him on giving two weeks notice.

R. left complainant's employment without notice and entered into the employment of another ice company, serving ice to about forty of complainant's customers within the prescribed limits and on the complainant's routes.

Held, that an injunction was not against public policy; that the agreement was not unreasonable as to distance or time; and that the payment of wages was a sufficient consideration to support the agreement.

A preliminary injunction was granted as against R. and refused as to his new employers, who were in ignorance of his agreement with complainant.

MOTION for a preliminary injunction.

Evans & Dettra, Esqs., for plaintiff.

John Faber Miller, Esq., for defendant.

Opinion of the court by WEAND, J., July 25, 1904.

By agreement dated October 25, 1902, the defendant, Louis Rutherford, entered into the employ of Katharine Shoemaker and Hutchinson Smith, administrators of the estate of William H. Shoemaker, deceased, and their assigns.

His employment was stated to be "as a driver and salesman, who agrees to drive their wagons and sell their goods, or that of their assigns, over ice routes of the party of the first part or their assigns, and not to sell any other goods while in their employment or in that of their assigns."

The agreement also stated that "the said party of the second part agrees that when he shall leave the employment of the said party of the first part or their assigns, he will immediately give to them a full and complete list of all the customers on the said routes with their residences at the time he leaves it; and that he will not thereafter for a space of five years sell, directly or indirectly, any ice,

either on the aforesaid routes or any other routes of the party of the first part or their assigns, in the said county of Montgomery, within fifteen miles of Ogontz, but will use his influence and best endeavors to have the customers on said routes continue buying of the party of the first part or their assigns."

His salary was to be ten dollars per week.

It was also stated in the agreement that defendant was to give two weeks notice of his intention to quit the employment of the party of the first part or their assigns prior to quitting the same; and the party of the first part or their assigns, on giving two weeks notice, might discharge him from their employment or might discharge him at once on payment of two weeks salary.

This agreement was assigned by the administrators to the Shoemaker Ice Company on or about April 1, 1903, and Rutherford continued thereafter in the employ of said company for several months, when without notice, as required by his agreement, he left the Shoemaker company, as he said, to get higher wages, and entered into the employ of the other defendants. He has been selling and delivering ice for his present employer to about forty customers of the Shoemaker company, who have thus lost that amount of trade. The Shoemaker company had prepared a new agreement, identical in terms with the old one, which they wanted all their employes to sign. This was refused by Rutherford.

During the summer months the Shoemaker Ice Company increased Rutherford's pay to twelve dollars per week, reducing it to ten dollars again when the busy season was over. This was a mere gratuity.

There is no evidence to show that the other defendants knew the conditions of Rutherford's agreement when they employed him, nor is there any evidence that they used any inducement or persuasion to leave the employ of plaintiff company.

The uncontradicted testimony shows that Rutherford has left the employ of plaintiff company without giving the required notice, and that he has been serving ice to former customers of said plaintiff for the other defendants, in violation of his agreement.

Defendant's contention is that the agreement is in restraint of trade and against public policy; that it is unreasonable as to time and distance limit; that it was abrogated or annulled by the plaintiff

when for a time it increased his pay and asked him to sign a new agreement, and want of consideration.

How an injunction against Rutherford is against public policy we do not understand. It would be so if he was deprived of following some special occupation by reason whereof the public would be deprived of his special knowldege or skill, or in which he was earning wages because of this peculiar knowledge and skill. But as a deliverer of ice he suffers no loss of work, for he can procure employment in various ways demanding no special fitness. The public will not suffer because another delivers their ice; and when a man deliberately breaks his solemn engagement not to betray his trust, even public policy will not protect him. Nor is it in restraint of trade. No special fitness, skill or art is required to be the driver of an ice-wagon, and no trade is involved.

The agreement is not unreasonable. As was said of a milk route in Erie County Milk Association vs. Ripley, 18 Superior Ct., 28: "The employment is peculiar. The value of the business consists largely in the intimate knowledge of the route and the acquaintanceship of the patrons."

In Pittsburg Store Company vs. Pennsylvania Store Company, 208 Pa., 37, the agreement was not to go into business for five years and in three states; and an injunction was granted.

In Pittsburg Valve Company vs. Construction Company, 35 Pitts. Leg. Jour., 1, the agreement was for ten years east of the Mississippi; and an injunction granted.

The increase of wages during the busy season was a mere gratuity, and did not alter the agreement. It was simply an act of generosity on the part of the employers, for which they should be commended instead of being punished; and it comes with exceeding bad grace from an employe who has thus been favored to claim that from it he is released from the performance of his solemn promise to be faithful to his employers.

The request to sign a new agreement has no significance. It was a business proceeding by which plaintiff desired to have its contracts in its own name, and can not be construed to mean that it considered the old agreement abrogated; and besides, the refusal of Rutherford to sign such new agreement is, in law, a declaration that he stood by the old one.

In Pittsburg Store Company vs. Pennsylvania Store Company, *supra*, the court said: "A contract in partial restraint of trade must, like any other contract, have a consideration to support it. A valuable consideration, however, is sufficient. The law does not impose upon a party seeking to enforce such a contract the duty of showing that the consideration is adequate. As is well said by Rogers, J., in Hind vs. Holdship, 2 Watts, 104: 'It is not essential that consideration should be adequate in point of actual value. The law does not weigh the quantum of consideration, having no means of deciding on that matter; and it would be unwise to interfere with the facility of contracting, and the free exercise of the judgment and will of the parties. The law allows them to be the sole judges of the benefits to be derived from their bargains, provided there be no incompetency to contract, and the agreement violates no rule of law.'"

In Erie County Milk Association vs. Ripley, *supra*, the consideration was, as here, wages by the month, and the question of want of consideration was the controlling factor, the court saying: "In Fralich vs. Despar, 165 Pa., 54, it was held that an employe who, in consideration of an increase in his wages, agrees not to reveal the secrets of his master's trade which are revealed to him, has no right to use the secrets so obtained for his own private use or reveal them to others. In such case equity will interfere to protect the master. This rule applies, we take it, whether the consideration be an increase in wages or a part of the original consideration. The prime object of the contract on the part of the plaintiffs was not only to secure the services of the defendant but to protect themselves against the use of the knowledge which he might acquire in the employment against them. The defendant was the judge of the reasonableness of the consideration."

The case of American Ice Company vs. Luff, 12 Dist., 381, is identical in point. The same defence was there made as here; the employment the same, and a similar agreement not to engage in the same service. In an elaborate opinion Judge Martin reviews the cases bearing on the subject, and said: "The restriction to which defendant agreed was for a valuable consideration (Harlan vs. Harlan, 20 Pa., 303) for a limited time, and within a prescribed territory, and as such was valid and binding: McClurg's Appeal, 58 Pa., 51; Smith's Appeal, 113 Pa., 579. Defendant has deliberately violated his agreement, to the injury of complainant, manifestly because he

is of opinion that it will pay him better to break the contract than to keep it. As there is utter uncertainty in the calculation of damages, and the measure is conjectural, equity will intervene because of the inadequacy of the legal remedy: Com. vs. Pittsburg, &c., R. R. Co., 24 Pa., 159." We therefore are of opinion that an injunction should issue against the defendant Rutherford.

We can not enjoin the other defendants at this time. To do so would be to say that persons can not deal with them simply because they formerly dealt with plaintiff. If after Rutherford is enjoined they should continue him in their employ, or in any manner hereafter procure from him information as to routes, customers or business of plaintiff, in violation of Rutherford's agreement, the application can be renewed.

And now, July 25, 1904, a preliminary injunction is granted until final hearing, enjoining and restraining the said Louis Rutherford from selling, directly or indirectly, or delivering for himself or any other person or persons ice in violation of his contract with Katharine Shoemaker and Hutchinson Smith, administrators of the estate of William H. Shoemaker, deceased, assigned to the Shoemaker Ice Company, to persons along his former or any other routes or places within the limits as set forth in his contract, plaintiff to first enter bond in $300. And it is further ordered that as to the other defendants an injunction is at this time refused, with leave to plaintiff to renew its application upon proof that said defendants are continuing said Rutherford in their employ, or in any manner procuring from him information as to the routes, customers or business of said plaintiff, in violation of said Rutherford's contract with said plaintiff.

Court of Quarter Sessions of Montgomery County.

In re Road in Lower Merion.

The petition for the appointment of a road jury is not required to be verified by oath or affirmation.

The notice of view may be signed by counsel for petitioners, or the viewers, or a majority of the viewers. Since the occasion in Road in Manheim, 12 Sup. Ct., 279; West Donegal Road, 21 Sup. Ct., 620, and Glenfield Borough Road, 5 Sup. Ct., 222, the petition for the vacation of a road need only set forth that the road is useless, inconvenient and burdensome.

A course on a draft was by a clerical error omitted from the report. As the object of the draft is to explain and make clear the report of which it is a part, an exception on this ground was overruled.

The petition having set forth the courses and distances of the road asked to be vacated, it was not necessary to give the length in feet or yards.

A petition to lay out a new road may also ask for the vacation of an old road if such should become necessary by reason of the old road thereby becoming useless, inconvenient and burdensome.

Exceptions to report of viewers.

Evans, Holland & Dettra, Esqs., for petitioners.

Hillegass & Larzelere, Esqs., for exceptants.

Opinion of the court by Weand, J., November 20, 1903.

Twenty-one exceptions have been filed to this report. The remarks of Justice Mestrezat in Siefried vs. Pennsylvania Railroad Company, 206 Pa., 399, can be appropriately cited: "It is not the uumber of exceptions taken during the trial nor the number of assignments of error filed in this court that determines the importance of the cause or the merits of the appeal when the case reaches the appellate court. This suggestion has been made so often by this court that its repetition would seem useless were it not that occasionally counsel still seem to think it necessary to raise the same question by several different assignments of error."

The first exception avers that the petition is not verified by oath or affirmation. We know of no act of Assembly which requires the petition to be under oath or affirmation. Our rule of court (No. 13) has never been construed to apply to a petition for a road jury, and we hold it inapplicable. It might, however, apply to exceptants' exceptions which are not under oath. It is not necessary now, however, to decide that point.

Exceptions 2, 7 and 21 were withdrawn on the argument.

Exception No. 3 is overruled. There is nothing in the law that requires the notice to be signed by the viewers or all of them. Exceptants had notice.

Exception 6. No reasons are assigned for this exception.

Exception 17. There is no evidence to sustain the exception.

Exceptions 19 and 20. There is no evidence to sustain these exceptions.

Exception 22. The report shows that four of the commissioners of the township were present. They file no exceptions. The report shows that all interested parties were notified and appeared.

Exception 4. In Road in Manheim, 12 Sup. Ct., 279, and West Donegal Road, 21 Sup. Ct., 620, and Glenfield Borough Road, 5 Sup. Ct., 222, it was held that the petition need only set forth that the road is useless, inconvenient and burdensome.

Exception 8. The draft does not contradict the report. The surveyor has simply reversed the course.

Exception 9. A course on the draft is by a clerical error omitted from the report. "The object of the draft is to explain and make clear the report of which it is a part": Elliott vs. Evans, 8 Montg. Law R., 217.

Exception 10. The petition sets forth the courses and distances of the road asked to be vacated. It is not necessary to give the length in feet or yards.

Exception 11. There is no intermediate point fixed in the petition for the new road. The reference to a point of intersection in the course of the road asked to be vacated does not in any particular fix a definite point in the course of the proposed new road.

Exception 12. There is nothing substantial in this exception. Both the report and the draft are sufficiently explicit.

Exception 13. Here again the course is simply reversed. The draft shows the meridian line. No mistake can be made in the description as given.

Exceptions 14, 15 and 16. These exceptions are purely technical, and do not go into the merits of the case.

Exception 18. There is no evidence to sustain this exception to show that the finding of the viewers is not correct.

The fifth exception is the one upon which most stress is laid.

It reads as follows: "The petition is not in form a petition to change or vacate portions of Hagy's Ford road and Flat Rock Rock road and to supply the same, but is a petition to lay out a new road and to vacate portions of the aforesaid roads in the same proceeding, which the law does not permit or contemplate." Or, in plain words, you can not ask for a new road and the vacation of an old one in the same petition. The argument is that the act of 1836 does not provide for such action. In Section 1 provision is made for a new road, and in Section 18 to change or vacate; "and the said court shall proceed therein by views and reviews, in the manner provided for the laying out of the public roads and highways." Nothing is said about separate petitions, nor can we see why the two purposes may not be embraced in one petition and referred to the same jury. It does not follow that when laying out the new road they will vacate the old one; but certainly the advisability for so doing can better be judged of by them than subsequently by another jury. The act provides that the old shall not be vacated until the new is actually opened and made. Nor is it any good reason against the method that by refusing to vacate there may be parallel roads, for such may be necessary to accommodate the public. As the exceptions state, this was not a proceeding in form to change but to lay out a new road; and if in consequence the old roads were useless, inconvenient and burdensome, then to vacate them. The expression in the petition that "the laying out of the new road and the vacation of the old road as above described will be in effect the relaying out of the Hagy's Ford road" is merely setting forth a result but is not the purpose of the petition. That this form of proceeding has received the sanction of the profession is evident from the fact that a form for laying out and opening is given in Pennsylvania Form-Book (Richards, Vol. 2, page 1133), and in Smith's Forms, page 688.

In Road in Ross Township, 36 Pa., 87, the petition was "to vacate the road in question" and "to vacate such parts of roads as it may supersede." The proceeding was declared defective because neither the petition nor the report set forth clearly the situation and other circumstances of that part of it which the petitioners desired to have vacated. No certain road was ordered to be vacated but only such as might be superseded, and there was nothing to indicate to the supervisors what roads were intended. Judge Swartz

sustained a similar proceeding in Cheltenham Road, 17 Montg. Law R., 18.

Otter Creek Road, 104 Pa., 261, has no bearing on the case.

Stress is laid on Judge Archbald's opinion in Blakely Road, 8 C. C. R., 498, which was an entirely different case. It is evident from the opinion that the case disclosed facts not appearing in the report of the case. There had been a previous proceeding, which was condemned, and the parties by indirection attempted to accomplish their purpose. When the opinion says "the viewers, if appointed, could, upon this petition, be authorized to lay out a new road and still leave the old road standing, thus making two parallel roads between the same points," it shows that the object was not to lay out a new road distinct from the old but merely to change or relay the old road; but the Judge scarcely intended to say that a new road starting and ending at different termini of the old should thereby be condemned merely because it was parallel. The petition itself showed that the beginnings and endings of the old and new road were the same, and it was therefore a proceeding merely to relay or change the old road.

We are not convinced that our practice is contrary to law, and overrule the exception.

And now, November 20, 1903, all the exceptions are overruled.

Court of Common Pleas of Montgomery County.

Appeal from Assessment by William W. Harrison.

In an appeal from the assessment of property for taxation the court, in reviewing the work of the assessors, must show due regard for the valuation made of other real estate in the county; but this does not mean that the mistake in assessing a particular property becomes the standard in valuing other properties.

The cost of a property is not the test of its valuation for taxation purposes. Where, however, the property is of such a character that there are no similar properties for comparison and no sales in the market of similar properties, the assessors in solving the difficult problem may obtain some little aid in considering the cost of the improvements; but the true test must be, "What will the property bring at a *bona fide* sale after full public notice?"

Harrison's Appeal.

APPEAL from the valuation and assessment of mansion-house property for purposes of taxation. No. 18, June T., 1904.

L. M. Childs, Esq., for plaintiff.

J. P. Hale Jenkins, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., July 28, 1904.

The appellant is the owner of a very valuable tract of land situate in Cheltenham township. The improvements consist of a palatial mansion and suitable out-buildings. There are few residences in the county that can compare in magnificence with this suburban home of the appellant. The assessor, with the help of two assistants selected by the township commissioners, valued the property for the purposes of taxation at two hundred and twenty five thousand dollars. Mr. Harrison appealed to the county commissioners, but after a hearing they declined to reduce the assessment.

At the hearing of the appeal to the Court of Common Pleas the testimony of several witnesses was taken on behalf of the appellant, and the commissioners of the county also called witnesses to sustain their action in refusing to reduce the valuation.

Counsel for the appellant submitted the assessed valuation of other properties in the vicinity and of properties situate in other townships of the county. It is claimed that these other assessments show that the valuation of Mr. Harrison's property is not just and equitable as compared with them.

That there are inequalities in the assessments when particular properties are selected for comparison can not be denied. Assessors will make mistakes; their judgment is not infallible. Their task is not an easy one, and the wonder is that they succeed as well as they do.

The assessors are to value property at what in their judgment it would bring at a *bona fide* sale after full public notice. And the court in reviewing their work is to make such orders and decrees as may seem just and equitable, having due regard to the valuation and assessment made of other real estate in the county. This does not mean that the assessed valuation of any particular property is to form the basis of assessment for the property under consideration. The property selected for comparison may show a mistake on the part of the assessors; and if the court were to adopt the false standard, the mistake of the assessor would be perpetuated. Due

regard to the other assessments in the county means the general average assessment of property of the same class in the locality and county. If, for example, the assessments in Lower Merion township are below the price the properties would bring at a *bona fide* sale, it will not do to lower a particular property in Cheltenham township to the standard adopted by the assessors in Lower Merion. The proper remedy would be to raise the Lower Merion properties to the value demanded under the law. The same is true where a particular property in Cheltenham is selected for comparison which is assessed too low. The low assessment should be raised to conform to the general assessment in the township. This is the only fair method to be adopted if each property is to pay its proportionate share of the county and township taxes.

The properties selected in Cheltenham for comparison do not convince us that the appellant's mansion and sixty-four acres are assessed at figures above the valuation placed on similar properties. His property is of such a character that few others, if any, can be selected as similar for comparison. It may be too high as compared with some of the Lower Merion assessments. To adjust the valuation according to the Lower Merion standard would compel us to make a general reduction throughout the county, and at the same time we would violate the requirements of the law that properties are to be assessed according to their *bona fide* selling value.

So far as the land itself is concerned the appellant has no cause of complaint, for the land proper was valued at one-half the price placed upon certain alleged similar properties in the township.

Nor are we convinced that the property in question is assessed at more than it would bring at a *bona fide* sale after full public notice. Properties of this character can not be said to have a market price. They are not usually for sale. They will not bring the money that was invested in the improvements. If this were the test no doubt Mr. Harrison's assessment would have to be doubled, for according to the evidence the cost is far beyond the assessment. Because they are not for sale or because there is no ready buyer does not prove the assessment too high in this class of properties. Properties of this character are at times sacrificed; but such sales do not fix any real values.

The owner usually is the builder, and the improvements con-

form to his tastes. He stamps upon the property his own individuality. Buyers who have means to enjoy homes costing a quarter of a million dollars prefer to be their own architects, and will build and improve rather than buy the constructed homes which may contain the eccentricities of the owners who made the improvements. While this circumstance must be considered by the assessor, he can not ignore the expenditure made in improvements. He should not ordinarily value them at their cost; but they are of great value, even if there is no ready buyer at cost figures. The assessor has a most difficult task in valuing properties of this class. A careful consideration of the evidence does not convince us of any substantial error. Our duty is not so much to ascertain the *bona fide* sale value of the property as it is to determine from the proofs submitted whether the assessment is excessive, having due regard to the valuation put upon other property with which a comparison can be fairly made. We are satisfied that the appellant will not be calledupon under his assessment to pay more than a due share of the county and township taxes.

We must not forget that the county commissioners and the assessors are endeavoring to comply with the law, which demands an assessment of properties at their market value. Because they may fail in a few cases to fix full values on particular properties is no good reason for disturbing the general assessments made in accordance with the law.

And now, July 28, 1904, the appeal is dismissed at the costs of the appellant.

HARVEY F. RICKERT VS. PHILADELPHIA AND READING RAILWAY COMPANY.

Under the act of March 17, 1869, P. L. 12, the damages to be awarded for changing the site of a bridge or road are to be paid to the owner, or person interested, at the time. A person who merely has the option of purchase, title not to be made until several years afterward, is not an owner or person interested within the meaning of the act.

PETITION for appointment of viewers and filing of bond. No. 85, March T., 1904.

J. V. Gotwalts and *Henry Freedley, Esqs.*, for plaintiff.

Montgomery Evans and *James Boyd, Esqs.*, for defendant.

Opinion of the court by WEAND, J., September 5, 1904.

The petitioner alleges that he is the owner of land in the township of West Pottsgrove, and that the defendant company has relocated a bridge over its tracks and thereby has taken and destroyed his lands. He asks for a bond and a jury to assess damages under the act of March 17, 1869, P. L. 12.

To this petition an answer has been filed by the defendant company, in which it denies that the petitioner has any title to the lands specified in his petition.

From the evidence it appears that John A. Selinger was the owner of the land in dispute, and on February 14, 1903, entered into an agreement of sale with Rickert for the sale and purchase thereof, title to be made on or before February 14, 1906, the purchaser to pay for the same in monthly installments. This agreement was never recorded, nor had the defendant company any notice thereof. Plaintiff has not paid all of the purchase money, and has no deed for the premises.

John Selinger, it is claimed, agreed with the defendant company as to the location of the bridge.

It must be conceded that unless plaintiff is an owner, or person interested, within the meaning of the law, he can not have a jury to assess damages for the taking of land under the right of eminent domain or under the act of 1869.

Under his agreement he is but an equitable owner not having a perfect title. If he is now given damages to the extent of the depreciation, and should default or recede from his bargain, he will be paid for what he never actually owned; and as the company has not

given bond, it would be liable as a trespasser to the real owner prior or subsequent to the trespass.

Nothing is said in the agreement as to when plaintiff would be entitled to possession, and he therefore, until he became the legal owner, would not be entitled to maintain ejectment either against Selinger or the railway company; nor could he maintain trespass, if not entitled to possession. Damages to land are to be assessed to the owner at the time of injury, being personal to the owner at that time.

The case having been submitted on petition and answer, we are of opinion that the petition must be refused.

And now, September 5, 1904, the petition is refused.

William W. Rickert vs. Philadelphia and Reading Railway Company.

Under the act of March 17, 1869, P. L. 12, the damages to be awarded for changing the site of a bridge or road are to be paid to the owner, or person interested, at the time. A person who merely has the option of purchase, title not to be made until several years afterward, is not an owner or person interested within the meaning of the act.

Petition for bond and jury. No. 86, March T., 1904.

J. V. Gotwalts and *Henry Freedley, Esqs.*, for plaintiff.

Montgomery Evans and *James Boyd, Esqs.*, for defendant.

Opinion of the court by Weand, J., September 5, 1904.

Prior to 1903 a bridge crossed the defendant company's tracks to connect lands owned on both sides by Joseph and John Selinger. The defendant company in widening its tracks changed the location of the bridge with the consent, as defendant claims, of the Selingers. A part of the land lying north of the railroad has been laid out in town lots by the Selingers, and plaintiff has an agreement of purchase for three lots, which he says are damaged by reason of the change of location of the bridge. His claim is denied, first, because as the bridge was only intended as a farm crossing it has served its purpose if the land is no longer farm land; and second, because the plaintiff is not the owner of the lots in question. It appears that

the plaintiff has an agreement to purchase, title to be made on or before March 28, 1906. He has no record title; but title to the whole tract of record is still in Selinger. If plaintiff should now be allowed damages, and default in his purchase, complications might arise when the lots were resold or in a claim made by present real owners. If the record owners and the persons for whose benefit the crossing existed have given their consent to the change of location, the defendant company ought not to be held liable to unknown parties. The streets upon which plaintiff's lots abut were not laid out by legal proceedings, but exist merely on paper; and there is no evidence to show any right of plaintiff to have a crossing at any point. There is no taking of his land under the right of eminent domain; and if injured otherwise he may have a remedy in another form of proceeding.

If this plaintiff has any interest in the crossing, and is entitled to damages, the same right would extend to the other lot-owners similarly situated, and we would have a multiplicity of suits. Whether a bill in equity would lie to restore the crossing is not now decided, as we prefer to base our decision upon the finding under the case as presented that plaintiff is not such owner as entitles him to the relief prayed for; and if he is, that as his property has not been taken his proper remedy is trespass.

And now, September 5, 1904, the petition is refused.

JOHN A. SELINGER ET AL. VS. PHILADELPHIA AND READING RAILWAY COMPANY.

The petitioners asked for a jury to assess damages by reason of the change of location of the site of a bridge. Defendant alleged in its answer that plaintiffs had consented to the change. This was denied by them. *Held*, that plaintiffs were entitled to a jury.

PETITION for appointment of viewers. No. 87, March T., 1904.

J. V. Gotwalts and *Henry Freedley, Esqs.*, for plaintiff.

Montgomery Evans and *James Boyd, Esqs.*, for defendant.

Opinion of the court by WEAND, J., September 5, 1904.

This application is presented under the act of March 17, 1869, P. L. 12.

The answer of defendant alleges that a crossing over defendant's railroad was changed to a new location by consent of plaintiffs; and that their remedy, if any, is under the act of April 4, 1833, P. L. 144, incorporating the Philadelphia and Reading Railway Company.

It is somewhat difficult to tell upon what particular grounds the plaintiffs base their claim, whether for interruption of crossing, taking of land, or consequential damages. The act of 1869 would seem to cover either ground; but of this we do not now decide. Defendant's allegation that plaintiffs consented to the change is denied by them, and on this point they are entitled to a jury trial; and the question as to whether they have adopted the proper remedy, or are properly joined in one petition, can be more intelligently decided if the jury should report in their favor.

And now, September 5, 1904, a jury will be appointed.

MICHAEL J. SHAW VS. THE BURGESS AND TOWN COUNCIL OF CONSHOHOCKEN.

Where the plaintiff in a negligence case states that he knew the dangers of a wagon-way over a bridge, it is not error to leave to the jury the question whether the plaintiff as a foot passenger was negligent in not taking the safe foot-way provided for travelers on the other side of the bridge, even where the court declares that it is negligence to test a known defect in a highway where a perfectly safe way is provided free from such defect along the same highway, which safe way is well known to the plaintiff.

The facts established on the trial of the case were such that it was the duty of the court to submit to the jury the question whether there was negligence on the part of the borough in the care of its streets. The court could not declare that there was negligence. It is the duty of the Judge in some cases to express an opinion on the facts, but he must not take the facts from the jury by giving binding instructions.

MOTION and reasons for a new trial. No. 13, June T., 1903.

Henry M. Tracy, Esq., for plaintiff.

Evans, Holland & Dettra and *F. S. Clark, Esqs.*, for defendant.

Opinion of the court by SWARTZ, P. J., September 19, 1904.

Fayette street is in line with the bridge across the Schuylkill canal. The bridge has a drive-way for teams and a separate board-walk for foot passengers. Canal street enters the bridge approach

at an angle. In going along Canal street to cross the bridge from the east a stone wall about three feet high runs along the right hand side of Canal street. This stone wall ends at the bridge structure, and there is a narrow opening between the end of the wall and the post which forms part of the bridge truss. The foot-way of the bridge is on the opposite side from this aperture at the end of the wall. In approaching from the east to cross the bridge the drive-way is on the right hand and the foot-way on the left hand. The drive-way and foot-way are separated by the left hand truss of the bridge.

By actual measurement this opening on the extreme right side of the drive-way is six and five-eighths inches wide on the surface of the ground; thirty inches above the ground it is seven and seven-eighths inches wide; and at the top, for a distance of three inches, it is eleven inches wide. The coping stone is three inches thick, and the greater width of the opening for these three inches is due to the fact that the corner of the coping-stone was broken off. The wall is thirty inches thick and thirty-three inches high. The post or wooden pier that stands next to the wall is twenty-six inches square. Therefore, the aperture is narrow and is bounded on one side by a stone wall more than two feet thick and on the other side by the wooden pier twenty-six inches square.

The plaintiff claims he approached the drive-way of the bridge by way of Canal street, and claims that as he was about to cross over from the east side he tripped on a stone about three feet away from the opening and fell through it onto the tow-path about fifteen feet below.

The case was submitted to the jury, and it found a verdict against the plaintiff. We are not surprised at this conclusion. To us it seems almost impossible that a full-grown man, with the full command of his footsteps, could fall through this narrow opening in the manner described by the plaintiff. If a man tried to fall through an opening of this character, we think the feat would be most difficult. He would have to stand close to the wall at the time of the fall, otherwise the thickness of the wall would prevent his body from extending far enough beyond the wall to drop over.

At the trial counsel for plaintiff submitted two points. Complaint is made of our answers to these requests for instruction. Each point submitted, as we read it, asks us to say that it was negligence

on the part of the borough not to place a barrier at this aperture or opening. We instructed the jury it was for them to decide whether a barrier should have been placed at the opening—that is, whether it was negligence to leave the opening as it existed on the night of the accident. Under the evidence we could not affirm these points, but in refusing them we were careful to state that if the jury found that the borough was negligent in not placing a barrier across the opening, and such negligence brought about the accident without any contributory negligence on the part of the plaintiff, then he was entitled to a verdict.

The character of the opening, its location where two telegraph poles in part at least guarded the opening, the lights on the highway and at the station and stair-way leading to the station, the provision of an entirely safe passage-way for foot travelers on the opposite side of the bridge, and the other surrounding facts, were all matters for the consideration of the jury in determining whether there was negligence on the part of the borough in the care of its streets.

In the reasons for a new trial excerpts from the charge are cited and assigned for error. A careful reading of these citations in connection with the contexts satisfies us that there is no just cause of complaint.

We made suggestions for the consideration of the jury; but in no instance was any question of fact or conclusion from the evidence withdrawn from their consideration. We called attention to the safe foot-walk on the opposite side of the bridge. We did not intimate that this would excuse the borough in its care of the bridge on the side where the wagon-way was provided. On the contrary, we stated that the plaintiff had the right to cross over the bridge by the driveway. The question submitted was whether the side of the wagon-way must in all respects receive the same high degree of protection or care as the specially prepared foot-way where travelers are accustomed to pass. The greater the travel the greater is the need for protection. In determining what is a sufficient foot-way the Supreme Court said: "Of course there is a difference in this respect between the villages and small country towns of the state and the cities and larger towns, in which the travel is so much greater. What would be negligence in the latter might be sufficient care in the former": Forker vs. Sandy Lake Borough, 130 Pa., 136. So here the travel

on one side being necessarily extensive while on the other but slight, it may well be that a better way should be provided for the greater travel. But we did not even state that this was the law. We submitted the matter as an element to be considered by the jury in determining whether the side of the drive-way was kept reasonably safe for travel. There was no danger from the opening to any one who traveled by wagon.

Plaintiff having testified that he knew the danger of this aperture by his daily passage over the bridge, it is a question whether we went far enough in our instruction to the jury when we failed to direct them that it was the duty of the plaintiff to step across the highway and select the safe foot-walk and avoid the known danger of the cart-way. It is contended that in effect we gave this instruction. We said a person who knows a defect on a highway and voluntarily undertakes to test it when it could be avoided, can not recover against a municipality for loss incurred through such defect. By illustration and instruction we called attention to the principle that a man may not take his chances or test a known danger and recover if he loses. We left the jury decide whether this was such a known danger that the plaintiff took his chances and tested it when he passed on the drive-way instead of taking the board-walk. We followed Forks Township vs. King, 84 Pa., 230; Pittsburg Railway Co. vs. Taylor, 104 Pa., 306, and numerous other cases in the same line; but in leaving the whole question to the jury whether it was negligence not to pass on the safe side we kept within the ruling laid down in Musselman vs. Hatfield Borough, 202 Pa., 489.

A careful examination of the case and its trial does not satisfy us of any error calling for a new trial. The reasons for a new trial are dismissed and a new trial is refused.

THE SECURITY COMPANY OF POTTSTOWN, GUARDIAN OF SYLVANIA MISSIMER, VS. THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA.

A policy of insurance contained a provision that "this policy is issued with the express understanding that the insured may, provided this policy has not been assigned, change the beneficiary or beneficiaries, at any time and from time to time during the continuance of this policy, by filing with the company a written request, duly acknowledged, accompanied by this policy; such change to take effect upon the endorsement of the same upon the policy by the company."

The insured, in view of approaching death, desired to change the beneficiary named in his policy. The company's agent was sent for, and a letter was prepared in which the change was requested. The paper, unacknowledged, was sent with the policy to the company by the agent, with a request for blanks. These were not received by the agent until after the death of the insured; and the change was never noted on the policy.

The insurance company paid the money into court, and an issue was framed between the new and the old beneficiary. *Held*, that the original beneficiary was entitled to the insurance money.

The rights of a beneficiary in an insurance policy becomes vested on the issuing of the policy, and can not be divested without his consent except upon compliance with the terms of the policy or by provision of law.

INTERPLEADER. No. 120, March T., 1903.

J. A. Strassburger, Esq., for claimant, Mrs. Missimer.

J. V. Gotwalts, Esq., for Security Company.

Opinion of the court by WEAND, J., May 16, 1904.

This case was tried before the court without a jury. Harry Cassimer Missimer insured his life for $3,000 in the Pacific Mutual Life Insurance Company of California. The beneficiary named in the policy was "his daughter, Sylvania Missimer, should she survive him, otherwise to his executors, administrators or assigns, or to such other beneficiary as may be designated by the insured."

After the death of the insured a claim was made to the company by the widow for part of the insurance money; and by the guardian of Sylvania Missimer for the whole amount.

Suit having been brought against the insurance company, it was agreed that $2,000 should be paid to plaintiff, and $1,000 of the money was allowed to be paid into court; and Mrs. Missimer was allowed to interplead.

An issue was framed to determine the question as to who was entitled to the money paid into court.

FINDING OF FACTS.

1. Henry Cassimer Missimer died May 27, 1902, in Salt Lake City, Utah, leaving to survive him a widow, Lizzie Missimer, and

one child, a minor, Sylvania Missimer, for whom the Security Company of Pottstown, Pennsylvania, is guardian.

The deceased had been formerly married to Laura Freese, from whom he had been divorced. She makes no claim.

2. At the time of his death the deceased held a policy of life insurance for $3,000 in the Pacific Mutual Life Insurance Company of California, dated May 1, 1900.

3. The beneficiary named in the policy was "his daughter, Sylvania Missimer, should she survive him, otherwise to his executors, administrators or assigns, or to such other beneficiary as may be designated by the insured as hereinafter provided, at the home office of said company in San Francisco, California, upon due notice and satisfactory proof of the death of said insured."

4. A condition of the policy reads: "This policy is issued with the express understanding that the insured may, provided this policy has not been assigned, change the beneficiary or beneficiaries, at any time and from time to time during the continuance of this policy, by filing with the company a written request, duly acknowledged, accompanied by this policy; such change to take effect upon the endorsement of the same upon the policy by the company."

5. On May 23, 1902, Henry C. Missimer was in a hospital at Salt Lake City, Utah, and, in view of approaching death, desired to change the terms of his policy by making it read $1,000 to his wife and $2,000 to his daughter. For this purpose the agent of the company, then residing in Salt Lake City, was sent for. Under his directions a paper, reading as follows, was prepared and handed to said agent, Robert R. Cameron, together with the policy:

"Salt Lake City, Utah, May 23, 1902.

"Pacific Mutual Life Insurance Company,

"San Francisco, California:

"Gentlemen—I wish to assign $1,000 in Policy No. 36,730 to my wife, Mrs. Lizzie Missimer. You will therefore kindly change the policy to read accordingly, as it is my desire in case of death to have $1,000 paid to the above and $2,000 payable to my daughter, as named in the policy.

"Your early attention to the matter will be appreciated.

"Witness: Harry C. Missimer.

"Paul B. Missimer."

The paper was not formally acknowledged before a person authorized to take acknowledgments.

6. This letter and the policy were on the same day sent by the agent to the home office, with a request that blanks be sent. The blanks were not received, however, until after the death of Missimer; and a change of the beneficiaries was never noted on the policy by the company.

7. It was understood by Mr. Missimer, Mrs. Missimer and Paul B. Missimer, a brother of deceased, that out of the $1,000 Mrs. Missimer was to pay the funeral expenses of her husband. She had his remains taken to Pottstown, and paid out over $500 in expenses.

8. The father and mother of the deceased and his divorced wife have agreed in writing that $1,000 shall be paid to Lizzie Missimer.

9. Sylvania Missimer is a daughter by the first wife.

10. The insurance company makes no point of the fact that the notice of change was informal and not endorsed on the policy, but is willing to pay the proceeds of the policy to the person entitled by law.

CONCLUSIONS OF LAW.

1. That no legal change of beneficiaries was made by insured.

2. That Sylvania Missimer, the original beneficiary named in the policy, by her guardian, is entitled to the fund in court.

ARGUMENT.

In ordinary life insurance, where no power of divestiture is reserved, the general doctrine prevails that the issue of the policy confers immediately a vested right upon and raises an irrevocable trust in favor of the party named as beneficiary, a right which no act of the insured can impair without the beneficiary's consent: American and English Encyclopedia of Law, 2d ed. Vol. 3, p. 980.

"Where the insured designates another person as beneficiary the right of the latter as a rule at once becomes vested so that it can not be disturbed by assignment or will, or in any way without his consent, unless the right to make a new appointment is reserved by the terms of the policy itself, or by the regulations of the company subject to which the policy is issued, or by provision of law": Richards on Insurance, Sec. 36, p. 43.

"Of course the right to divest the interest of the beneficiary without his consent may be reserved in any contract of insurance. In such case the question of the validity of a designation of a new beneficiary is usually in effect the same as if the designation were the original one": Cooke on Life Insurance, 126.

In Brown's Appeal, 125 Pa., 303, the court said: "The insurance company came into the state and paid the money into court for the benefit of the party entitled to it. The present contest is between residents of this commonwealth over a fund in the possession of the court of the common domicile, and depends upon the construction of the contract under which the parties claim."

The policy was a contract between the insured and the insurer; but under it the daughter had a vested interest, only to be divested in the manner provided by the policy. The provisions for change of beneficiary requiring acknowledgment and endorsement, whilst primarily for the protection of the company, did not enable them after the death of the insured to prejudice her rights, as they were at that time, by waiving acknowledgment and endorsement, nor has the company done so. It has paid the money into court, to be distributed according to law; but this does not change the status of the parties. The provision that "such change to take effect upon the endorsement of the same upon the policy by the company" preserved the rights of the daughter until it was complied with; and it never was.

The company did not approve of the form of request, and consequently made no endorsement on the policy.

In Supreme Conclave vs. Cappella, 41 Fed., 1, cited in McLaughlin vs. McLaughlin, 37 Pac., 865, amongst the exceptions to the rule requiring strict compliance are said to be: "2. If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made"; and, "3. If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but before the new certificate is actually issued he dies, a court of equity will treat such certificate as having been issued." In this case the insured did not pursue the course pointed out, and he could not compel the company to accept the change until he had complied with the condition which allowed a change. Mrs.

Missimer stands in no better position than her husband. She never had a vested right in the policy.

This is not a case where it was impossible to literally comply with the conditions. The fault was in the delay in making a change or in not taking the acknowledgment. We have been unable to find any Pennsylvania reported case directly in point, but in Sangunitto vs. Goldey, 84 N. Y. S., 989, cited in American Digest, February, 1904, 407, it was held that "where a life insurance policy provided that the insured might change the beneficiary by a written notice to the insurer at its home office, accompanied by the policy, such change to take effect on the endorsement of the same on the policy by the company, a change of beneficiary was not effected by mere notice to the company, accompanied by the policy, without such endorsement."

A case precisely in point is that of Berg vs. Damkoehler, in Supreme Court of Wisconsin, 88 Northwestern, 606: "A life policy gave the insured a right to change the beneficiary by filing a duly acknowledged written request. The insured forwarded such request, but it was not acknowledged, and a blank form was returned to be filled out by insured and acknowledged. Before this was done the insurer died. *Held*, not to bring the case within the rule that where insured had pursued the rules, and had done all in his power to change the beneficiary, but died before the new policy was issued, it would result in a change in the beneficiary." And it was further held that payment of the amount of the policy into court by the company did not in any way affect the rights of the parties.

In the case cited the policy contained a provision in words similar to that in the one before us. We cite the opinion of the court as applicable here. "Under the policy in suit the insured had a right to change the beneficiary named therein by filing with the company a written request, duly acknowledged, accompanied by the policy. He attempted to make such change, but neglected to acknowledge his written request. The insurance company refused to recognize such request. It sent to its local agent in Milwaukee a blank form it had prepared for such cases, with instructions to have it signed and properly acknowledged. Before this could be done the insured died. The general rule is that the change in beneficiaries must be made in the manner required by the policy: McGowan vs. Foresters, 104 Wis., 173, 80 N.W., 603." This rule, however, in this

state is subject to several exceptions, one of which is that the insured may dispose of the policy by will to the exclusion of the beneficiary, when he has paid the premiums and kept control of the policy: Foster vs. Gile, 50 Wis., 603, 7 N. W., 555.

Other exceptions are where the company has waived a strict compliance with the rules; where it is beyond the power of the insured to comply with all the rules, and he has done all that is possible to secure the change; and also, when he has pursued the rules and done all in his power to change the beneficiary, but dies before the policy is issued: McGowan vs. Foresters, *supra;* Supreme Conclave vs. Cappella (C. C.), 41 Fed., 1. The defendant insists that the facts of this case bring it within the exception last mentioned. The difficulty with his contention is that it is not supported by the facts. The unacknowledged request was not in compliance with the requirements of the policy. The company refused to recognize it. The proper authentication of the written request was of importance to all concerned. It was material because made so by the contract. It was a protection to the company as against payment to persons who might fraudulently secure possession of the policy. It was a safeguard of the insured and his beneficiary for the same reason. See Rollins vs. McHatton, 16 Colo., 203, 27 Pac., 254; Mellows vs. Mellows, 61 N. H., 137.

The beneficiary had an actual subsisting interest in the policy, subject to the right of the insured, who had paid the premiums, to vest it elsewhere. Until such action by the insured the interest of the beneficiary is such a vested, subsisting interest as would pass to her administrator in case of her death: Foster vs. Gile, 50 Wis., 603. Upon the death of the insured her interest became an absolute property interest in the proceeds of the policy. The payment of the money into court by the company did not change the legal position of either party: Ballou vs. Gile, 50 Wis., 614.

The authorities cited seemed to be based on strictly legal principles, and we are not at liberty to reach a different conclusion.

VERDICT.

And now, May 16, 1904, verdict for The Security Company of Pottstown, guardian of Sylvania Missimer, for $1,000, amount paid into court, with accrued interest if any; and unless exceptions are filed within the time limited by law, the prothonotary will enter judgment accordingly.

SAMUEL KERLIN, TO THE USE OF WILLIAM D. MCFARLAN, JR., VS. REUBEN R. DAVIDHEISER, MILTON R. DAVIDHEISER, RACHEL E. REIFSNYDER, WILLIAM REIFSNYDER AND ALICE E. SMITH (FORMERLY ALICE LEVAN).

An action of assumpsit may be maintained against the alienee of a purchaser who took land under proceedings in partition charged with the payment of money as a means to enforce payment out of the land.

Heirs can not be compelled to divide their claim and pursue each part of the property for the sum charged upon it by the alienee. Whatever equities there may be among the several alienees in contributing the respective shares due by them must be adjusted among themselves.

MOTION for judgment for want of a sufficient affidavit of defence. No. 114, June T., 1903.

M. D. Evans and *Neville D. Tyson, Esqs.*, for plaintiff.

Wm. D. Young, Esq., for defendants.

Opinion of the court by SWARTZ, P. J., September 16, 1904.

Eli T. Kerlin died seized of certain real estate situate in Pottsgrove township, Montgomery county. Proceedings in partition were instituted, and resulted in a sale of the property to Jeremiah Reifsnyder. Eli T. Kerlin left to survive him a widow, one brother, three sisters, and also the issue of a deceased brother. One-half of the proceeds of sale was charged upon the real estate so sold to Jeremiah Reifsnyder, the interest to be paid annually to the widow; and at her death the principal of the charge was made payable to the persons entitled thereto, agreeab'y to the act of Assembly in such case made and provided. The dower fund so charged was fixed at $570. The widow died February 1, 1900.

Jeremiah Reifsnyder sold part of the premises so acquired to the defendants, Reuben R. Davidheiser and Milton R. Davidheiser. In the deed to the said defendants the dower charge, apportioned on the property, was fixed at $220. The heirs of Eli T. Kerlin were not parties to this apportionment, and had no knowledge of same.

Jeremiah Reifsnyder died seized of the residue of the property conveyed to him by the estate of Eli T. Kerlin, and by his will devised said residue to his wife for life with remainder to the defendants William Reifsnyder and Alice Levan.

The defendants are therefore the owners of the original tract of land charged with the dower fund in favor of the widow and the

heirs, although they are not owners in common of every part of the tract.

The proceedings in partition followed the act of Assembly, and the sum of $570 became a charge upon the entire tract sold to Jeremiah Reifsnyder. It is not shown that the widow and the heirs did any act discharging any part of the land from this lien. No payment was made by any one in release of the charge.

That an action of assumpsit may be maintained against the alienees of a purchaser who took land under proceedings in partition charged with the payment of money, as a means to enforce payment out of the land, is well established. The law implies a promise to pay on the part of the alienee; and the act of March 29, 1832, Sec. 41, makes liable him who holds the land as terre tenant: Dech vs. Gluck, 47 Pa., 403. Of course the judgment against the defendants is *de terris*.

We do not see how the heirs can be compelled to divide up their claim and pursue each part of the property for the sum charged upon it by the alienee. They may not be satisfied with the apportionment. See Shouffler vs. Coover, 1 W. & S., 400; Jones's Appeal, 14 W. N. C., 313.

A subdivision of the land might be so extensive as to compel the heirs to bring a multitude of suits. Whatever equities there may be among the several alienees in contributing, the respective shares due by them must be adjusted among themselves. The act of April 22, 1856, P. L. 532, has no application. If it can be invoked by the defendants, or any of them, it must be done after judgment is rendered against the defendants.

And now, September 16, 1904, judgment is entered against the defendants as prayed for, $145.63 with costs, execution however to be restricted to the land described in the plaintiff's statement.

Orphans Court of Montgomery County.

ESTATE OF LYDIA T. MATHER.

Where upon the termination of a life interest therein the residue of an estate consisting of personalty is bequeathed to nephews and nieces and the children and legal representatives of any who should be deceased at the time of distribution, the surviving widow of one of the nephews who died since the testator, without childre and intestate, is entitled to one-half the share of her deceased husband as one of his legal repres ntatives

ADJUDICATION of account.

The facts are sufficiently disclosed in the opinion of the court by SOLLY, P. J., July 16, 1904.

Neville D. Tyson, Esq., for accountant.

The estate for distribution is personalty. The testatrix expressly provided for the conversion of it into money. After such conversion, and the payment of debts and expenses, the executors were empowered to hold the residue in trust, pay the annual interest received to Susanna M. Levick, a sister, and to Charles Mather, a brother, during their lives and the life of the survivor, and upon their death to pay said residue, after deducting costs and expenses, to the nephews and nieces of testatrix (as if named) in equal shares, "and in case of the death of either of them at the time of said distribution, then the children and legal representatives of the one so dying to take the said share, and the children of my nephew, Samuel Levick (who is now deceased), to take the share their father would have taken had he been living."

We have the gift of the income of personalty to a sister and to a brother during their lives, with remainder over at the death of the survivor to the nephews and nieces of the testatrix, "as if named," in equal shares. The distribution to them is clearly per capita. The intent of the testatrix that they should take equally, share and share alike, could not be more clearly expressed. It is further shown in the clause providing that the children of Samuel Levick, a nephew, who was deceased when the will was executed, shall take the share he would have received had he been living at the time of the distribution.

The period of vesting is when distribution of the principal sum is to be made, and that is at the death of the survivor of the brother

and sister. If at that time either of the nephews or nieces are dead, then the children and legal representatives of the one so dying shall take that share. When the testatrix died, Charles M. Levick, one of the children of Susanna M. Levick, was living. He has since died. Henrietta W. Levick, his widow, was also the widow of William E. Levick, his brother. Neither of them left children or issue surviving. The widow claims she is entitled to their shares under the provision of the will that the children and legal representatives of any nephew or niece, deceased at the time of distribution, shall take the share.

The question submitted is whether the widow is entitled to the shares of her deceased husbands under the provision of the will that the children and legal representatives of any nephew or niece, deceased at the time of distribution, shall take the share of the one so dying. Of course, if she be entitled it can only be because she is included in the term "legal representative." As already stated, William E. Levick, her first husband, was dead when the will was executed, leaving no children or issue surviving. He was not included, therefore, in the class gift to the nephews and nieces of the testatrix. It is only those in being at the time of the death of a testator that take, unless the will otherwise directs: Gross's Estate, 10 Pa., 360; Guenther's Appeal, 4 W. N. C., 41; Harrison's Estate, 202 Pa., 331; Fosbenner's Estate, 18 Montg., 38. The will makes no reference to William. We are of the opinion, therefore, that he was not one of the nephews of the testatrix to whom the estate in remainder is bequeathed, and that the widow has no possible claim to a share as his personal representative.

The estate is to be distributed to the nephews and nieces, and to the children of Samuel Levick living at the time of the death of the testatrix, or to the children and legal representatives of any nephew or niece who may be dead at this time, the period of distribution.

Is Henrietta W. Levick entitled to participate in the distribution of the share of her husband, Charles M. Levick? As already stated, the fund is the proceeds of personalty. Is she one of his legal representatives within the meaning and intent of the will? The rule that where an intent appears to give to the representatives a beneficial interest, the words will generally mean the next of kin, under the statutes of distribution, and will include a widow, is recognized

in Ralston vs. Waln, 44 Pa., 279. In that case, the words "legal representatives" are held to mean the person or persons who would be the decedent's next of kin under the intestate laws of this State. To the same effect are Eby's Appeal, 84 Pa., 241; Lesieur's Estate, 205 Pa., 119; Potter's Estate, 13 Phila., 119.

The testatrix intended her nephews and nieces who survived her sister and brother, and the children and legal representatives of any then deceased, to share equally in her estate. Her first thought is her sister and brother, after them her nephews and nieces, and their children and legal representatives, if any are deceased, that is their next of kin, an equal and exact distribution among them and those entitled under them as children or legal representatives. We think the word "and" connecting "children" and "legal representatives" was unintentionally used, and should be read "or." If so read the intention of the testatrix is then effectuated. This may be done for such purpose, where the plain intent of the testatrix will be defeated without such substitution: 1 Jarman on Wills, 644; Tripp's Estate, 202 Pa., 260.

We are of the opinion that Henrietta W. Levick, as widow of Charles Levick, is entitled to a share of the fund, as one of his legal representatives, under the statute of distribution within the meaning and intent of the testatrix, and an award to her of one-half of his share will be made accordingly. The other half of said share will be awarded to Lewis J. Levick, one-fourth, and the children of Samuel Levick, deceased, one-fourth, namely, Anna Lucille Levick, Florence L. Sullivan, and Elizabeth M. Hicks, as the remaining next of kin of said Charles

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Court of Common Pleas of Montgomery County.

SIMON P. KLINE VS. THE PHILADELPHIA AND READING RAILWAY COMPANY.

One about to cross a railroad must seek a place to look where he can see, if that can be done; and if there be an obstruction to his view which is rapidly passing away, he should await its removal.

Where the evidence of the plaintiff and his witnesses clearly shows one of two conditions, either of which convicts him of contributory negligence, a non-suit is properly entered.

Kline vs. Philadelphia and Reading Railway Co.

Where the plaintiff drove upon a crossing when a moving object obstructed his view, so that he could not determine whether it was safe to cross, and is struck by a train which was hid from view by the moving object, he is guilty of contributory negligence. If the moving object did not obstruct his view, and he entered on the crossing with a clear view up and down the tracks for more than a mile, he must have seen the train if he looked at all. And if he saw it, he took his chances to pass in front of it; and if he did not see it, it was because he did not look. In either case, the accident was due to his own negligence.

MOTION to take off non suit. No. 60, December T., 1903.

E. L. Bennett and *A. R. Place, Esqs.*, for plaintiff.

Montg. Evans, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., September 29, 1904.

A short distance above the northern limits of the borough of Landale a public road, known as the Foundry road, crosses the tracks of the Philadelphia and Reading railway at grade. The grade crossing is in Hatfield township The railroad tracks run north and south and the public highway runs nearly east and west. The railroad and the public road cross at an angle of fifty-one degrees.

The plaintiff was approaching the crossing from the east. He had a hay-wagon with three horses abreast. The sides of the hay-body were about three feet high. The wagon was empty. As he drove along the highway the road way was level with the surrounding surface. About one hundred feet from the crossing there was a row of houses which obstructed his view to the north. When he passed to within forty feet of the crossing, the view to the north was unobstructed for a mile, or as far as his eye could carry his vision. The only intervening object was a maple tree of medium size, and on April 6, 1902, when the accident occurred, the tree was leafless, and formed no obstacle to his view. From this same point, forty feet away from the crossing, his view south was also unobstructed for at least thirteen hundred feet. The plaintiff's engineer made these measurements and observations, and concludes his evidence by stating that twenty or thirty feet away from the crossing, that is east of the crossing, you can see up and down the railroad tracks as far as the eye will carry. He describes it as a good crossing for seeing. He prepared a draft, and this was offered in evidence. An examination of it will show, if it is correct (and it is offered as made strictly according to scale from actual measurements), that at the distance of about sixty feet from the railroad crossing the view up and down the railroad tracks is unobstructed indefinitely.

As the plaintiff approached the crossing a freight train of thirty or more cars was running north on the track next to the plaintiff. There are two tracks and the trains going north take the east track; going south, they run on the west track. The plaintiff says that he stopped at a point about forty feet from the tracks, and waited until the rear car of the freight train had passed about two hundred feet north of the crossing; that he then started his team, looked up and down all the time, and saw no train other than the north-bound freight. He crossed the east track, and when his horses and part of his wagon had passed over the west track, a south bound express train struck him, and injured him. The hind wheels of his wagon were on the south-bound track when the express struck him. The accident occurred about four o'clock in the afternoon. The plaintiff says his sight and hearing were good. He also says that he reached the railroad tracks, and before his horses entered on the tracks he could see up the road for a mile. He saw no coming train. He was familiar with the crossing, and passed over it constantly in hauling coal for his employer.

There was evidence on the part of several witnesses for the plaintiff that they listened for the whistle, and heard no signal given by the express other than the danger whistle immediately before the collision. While the plaintiff declares he waited until the rear of the freight train had passed two hundred feet beyond the crossing, we are satisfied from the evidence of his witnesses that this statement is not in accordance with the real facts. Three of his witnesses, who were in good positions to see and observe, testify in effect that the plaintiff started his horses the moment the freight train had cleared the crossing. Mr. Seiple stopped a short distance from the crossing on the west side. He was waiting for the freight train to pass, so that he could cross over from the west. He says "just after the freight train passed I saw him start"; "the freight train had just gotten across"; "he thought he had a clear chance to get through." Henry Hoff says the rear of the freight was about fifty or sixty yards away from the crossing when the plaintiff was struck. This shows that the plaintiff must have started his team the moment the crossing was clear; otherwise he could not have reached the point where he was struck when the rear of the freight was but one hundred and fifty feet beyond the crossing. He says

further that "Mr. Kline drove right on the crossing immediately after the freight left."

His testimony is strengthened by the fact that he was in a position to observe and did note what was taking place at the time of the accident. He watched a man jump on the rear car of the freight train at the crossing, and at the time of this occurrence the plaintiff was in the act of driving on the crossing. It is quite evident that the accident occurred in a way not unusual. The plaintiff attempted to cross immediately behind a moving train when he was unable to see an approaching train because concealed by the moving train. See also the testimony of Henry Godshall. We will assume, however, that the plaintiff stopped about forty feet from the crossing and did not start his team until the rear car of the freight train had passed about two hundred feet beyond the crossing.

It is uncontradicted that the plaintiff did not stop again, but passed toward the crossing with a full, clear view up and down the tracks for a mile or more, except so far as his view north may have been obstructed by the moving freight train. We entered a nonsuit on the ground of contributory negligence on part of plaintiff.

In his efforts to recover damages the plaintiff is confronted with one of two positions—either he drove upon the crossing when a moving object obstructed his view, so that he could not determine whether it was safe to cross; or he drove upon the crossing when an approaching train was in full view, which he must have seen if he had looked at all. And if he saw it, he took his chances to pass in front of it; and if he did not see it, it was because he did not look up the tracks.

Here there can be no doubt of the plaintiff's negligence under the admitted facts, and the case is for the court. The undisputed facts are, "A good crossing for seeing," the plaintiff standing in his wagon with a full view of the approaching train for every foot it moved during the mile's passage north of the crossing, the plaintiff's sight and hearing good, and the time broad daylight.

He started from a point of safety close to the crossing when he could see up the tracks but two hundred feet. The freight train obstructed his view above the two hundred feet limit. His observation was of no protection whatever, for an approaching train concealed by the moving freight train was sure to overtake him by the time he drove the forty feet to the crossing. If, as he states, the

train was approaching at a speed of forty or fifty miles an hour, it moved about sixteen times as fast as his horses. So that while he moved forty feet the train moved more than six hundred feet. A train six hundred feet away was sure to overtake him at the crossing; and yet he could see up the tracks but two hundred feet when he started his team. He stopped and looked at a point where he could not possibly obtain a view to afford him protection, unless he remained till the moving object gave him a clear view up the tracks. If he had remained until the moving train had restored his full open view up the tracks, he could have passed with perfect safety. "This was a deliberate taking of a great risk rather than submit to a slight delay": Corcoran vs. Railroad Co., 203 Pa., 380. One about to cross a railroad must seek a place to look where he can see if that can be done; and if there be an obstruction to his view which is rapidly passing away, he should await its removal: Kraus vs. Penna. R. R., 139 Pa., 272; Hughes vs. Delaware and Hudson Canal Co., 176 Pa., 254; Hovenden vs. Penna. R. R., 180 Pa., 244.

But it is said that by the time he reached the crossing the receding freight train had cleared his view. This is not correct, even under the plaintiff's evidence; and under the testimony of his witnesses, the rear of the train was just passing the crossing as he entered upon it. Let us take the plaintiff's version. The freight was moving fifteen to twenty miles an hour. The plaintiff says "it went slow." If he was going at the rate of three miles an hour, the freight train passed five miles to his one mile. While he traveled over forty feet the freight had progressed but two hundred feet, so that as he reached the crossing his view was unobstructed for a distance of four hundred feet. According to his own testimony he attempted to cross with a view of four hundred feet, when a little delay would have given him a view of a mile. With a slow team he was certainly taking chances, when he knew that he might meet an express train coming south. He was quite familiar with the crossing, and must have known that express trains pass over it. He was employed as a teamster for Mr. Godshall. He hauled coal and feed for nine years, and was familiar with the crossing because he used it quite frequently. His employer's place of business was in Lansdale.

But suppose he had a good, unobstructed view, and the freight train was beyond the point where his own testimony places it; then

he is confronted with the proposition that he drove in front of the approaching train which he must have seen if he looked.

No grade crossing case has reached this court within our experience of over seventeen years that affords better facilities to observe approaching trains than are afforded at this crossing. It is said that the crossing is a diagonal one, and it is claimed that the acute angle increased its danger. The angle was not so sharp as to interfere with the view, especially where the driver stood up in his wagon which had no cover. The angle made it the more imperative to allow the freight train to pass a sufficient distance to give the traveler a full view. What was said in Newhard vs. Penna. R. R., 153 Pa., 417, disposes of this factor in the case. In the latter case the angle was far more acute than in the case now under consideration. We may say what was said in the Newhard case, "the acuteness of the angle of the crossing, so far as the facts of this suit are concerned, has no special bearing on the question before us." The plaintiff does not claim that he was lured into a perilous situation, from which he attempted to extricate himself. The stopping point he selected, as he says, was a safe one, and from it he could have obtained all the information that was necessary to give him a safe passage by even a slow movement of his team across the tracks.

It is useless to cite authorities to show that a man can not recover damages if in despite of what his eyes and ears must have told him he drove directly in front of a moving locomotive.

The case of Gangawer vs. Philadelphia and Reading R. R., 168 Pa., 265, is a complete answer to the plaintiff's case, even if we assume that he waited a sufficient time to allow the freight to pass. The Gangawer case was against the same railroad. The deceased drove a two-horse farm wagon. He approached the grade crossing from the west. He stopped about forty feet from the crossing, then drove on, passed over the first track, and was struck by an express train while he was crossing over the second track. At the forty feet point he could see a train coming from either direction for eight or ten hundred feet. As he approached the crossing still nearer his view extended for a distance of a third of a mile. The widow who brought the action was non-suited. In our case the plaintiff, according to his statement, must have done just what Mr. Gangawer did, except that the plaintiff was coming from the east and had an open view not of a third of a mile but of a mile or more.

We are satisfied that the evidence shows negligence in attempting to cross behind a moving train. If, however, we take plaintiff's version of the case, that his view was not obstructed by the moving freight train, then his attempt to cross in front of an approaching train which he could have seen in its onward movement for a whole mile if he had looked, shows negligence. To say that he did not see its approach is to admit that he did not look for it during the whole time he traversed the forty feet.

And now, September 29, 1904, the motion to take off the nonsuit is refused.

JOHN J. NOCTON VS. BOROUGH OF NORRISTOWN.

Where part of a street has been vacated under the act of May 16, 1891, P. L. 75, owners of property which abuts upon the street but not upon the part vacated are entitled to a jury to assess their damages, if any were sustained by reason of their property being left in a *cul de sac* as to the system of streets in the direction of the vacated part of the street. The difficulty in defining the limits where the right to compensation shall end is no valid objection to the claim of such property owners.

PETITION for appointment of a jury to assess damages for vacation of part of an alley. No. 85, October T., 1904.

Henry Freedley, Esq., for plaintiff.

Irvin P. Knipe, Borough Solicitor, *N. H. Larzelere* and *C. Henry Stinson, Esqs.*, for defendant.

Opinion of the court by SWARTZ, P. J., October 10, 1904.

The borough of Norristown vacated a part of Strawberry alley by ordinance in pursuance of the act of May 16, 1891, P. L. 75. The Pennsylvania Railroad Company applied to the borough for the vacation. It is the owner of the land on both sides of the alley so far as the vacation extends.

The plaintiff is the owner of a property situate at the corner of Lafayette street and Strawberry alley. His land extends along the alley and abuts thereon for the distance of ninety-six feet. His petition sets forth that his property does not abut on the vacated part of the alley, but that his land extends to within fifteen feet of the vacation.

The borough contends that the plaintiff is not entitled to damages for the vacation of a street or alley.

We granted the rule to enable the counsel for the borough to present his argument in support of his position.

Unless the act of May 16, 1891, gives the right to damages caused by the vacation of a street, the plaintiff has no standing to ask for a jury. Prior to the adoption of the constitution of 1874 it was decided in Paul vs. Carver, 24 Pa., 207, that vacation proceedings give no right to damages. Article XVI, Sec. 8, of the constitution, does not change the law as to damages caused by street vacations: McGee's Appeal, 114 Pa., 470. There is no constitutional right to damages in such case, even on the ground of injury, under the present constitution: Wetherill vs. Pennsylvania Railroad Co., 195 Pa., 156.

That the right to recover damages caused by the vacation of a street may be conferred by legislative provision, can not be doubted: Melon Street, 182 Pa., 402.

Does the act of May 16, 1891, confer this right? If it does, the plaintiff is entitled to his jury. His property does not abut on that part of the alley which is vacated, but he may be damaged by the vacation even if his property does not so abut on the vacated part: Melon Street, *supra*. In this preliminary inquiry we can not determine that his claim is too remote. If a vacation gives the right to damages, then an owner must have an opportunity to show that his loss results from the depreciation of the value of his land because of the change in the street; and that his loss is direct and proximate, and so obvious and substantial that it admits of calculation: Melon Street, *supra*. The plaintiff's property is very near to the improvement, for it abuts on the alley at the distance of fifteen feet from the vacated part.

When the plaintiff's bill in equity was before us we held that he had no standing to appeal from the ordinance of the borough —first, because he was not an abutting owner; and secondly, because it was a vacating ordinance. We went a step further and stated that under the law the plaintiff was not entitled to damages. This latter point did not properly arise in the disposition of the case. In reading Daughters of the Revolution vs. Schenley, 204 Pa., 572, we found in the opinion of the court what appeared to us at least a dictum that the act of May 16, 1891, gave no damages for the vacation of a street. We are not fully satisfied that we were in error in our first reading. It is true, however, that in that case the question

of damages was not material in the issue before the Supreme Court. The right of appeal under the act of 1891, in case of the vacation of a street, was the question under discussion. When the court say "he was not damaged, and therefore had nothing to appeal from," it may well be that the language refers to the standing of an owner prior to the act of 1891. If, on the other hand, we accept the language as a dictum against damages, we find in Melon Street an expression declaring that the act of 1891 does allow damages for a vacation. In that case, 182 Pa., 402, the court say: "The plaintiffs have sustained a loss for which they are entitled to recover, unless the right to recover for injuries caused to private property by the vacation of a street is limited to those whose properties abut on the part of the street vacated. The question raised is an important one as affecting not only proceedings under the special act of 1858 but also to those instituted under the general act of May 16, 1891, P. L. 75." It is quite manifest that the question under discussion was of no importance to cases under the act of 1891, if that act did not allow damages for the vacation of a street.

The act of 1891, especially in its third section, declares that "damages caused by the vacation of a street are to be assessed by the jury. The payment of damages sustained by the making of the improvements aforesaid, or by the vacation of any public highway, may be made either in whole or in part by the corporation or in whole or in part by assessments upon the property benefited by such improvements" . . . .

The title of the act is equally clear. It "relates to the laying out, opening, widening, straightening, extending or vacating of streets and alleys, ... providing for ascertaining the damages to private property resulting therefrom, the assessment of the damages, cost and expenses" . . . .

The first section of the act provides for the appointment of a jury whenever in the laying out, opening, extending, widening or grading of streets, . . . or in the vacation of streets and alleys, the damages or benefits have not been agreed upon.

The act of 1891, both in the title and in its body, links the opening and vacating of streets. The provision for damages, where property is injured, applies to the one subject as well as to the other. This is the only deduction that can be drawn from the third section. The section speaks of "the payment of damages sustained" by mak-

ing improvements or "by the vacation of streets." These damages are to be paid by the corporation or by the properties benefited. This section refers to the assessment and payment of damages and to no other matter. What purpose was there in introducing "the vacation" of streets into this section unless it was the intent to allow damages caused by the vacating of streets?

If damages by vacation can not be recovered, why was the vacation of streets introduced into a section that deals with the payment of damages and no other subject? It was a simple matter to leave out the words "by the vacation of a public highway" if it was the intent of the Legislature to accept the law as it then stood on the question of damages in street vacations. We must assume that the Legislature was aware of the existing law, and that the words were introduced for some purpose. In our interpretation of the statute we must give effect to them if possible. In section ten of the act the word "vacation" is eliminated. It is evident that the Legislature did not intend to give an appeal from vacating ordinances. The omission was intentional: Daughters of the Revolution vs. Schenley, 204 Pa., 582. If the Legislature was exercising this careful discretion, then we must hold that the vacation of highways was advisedly introduced into the third section. The plain reading of this section allows damages for the injury sustained by the vacation of streets; and it is always unsafe to depart from the plain and literal meaning of words out of deference to some supposed intent which would prevent their application to a given subject: City vs. Kalchthaler, 114 Pa., 547.

It is argued that the second section shows that no damages can be recovered for a vacation. This section declares that the jury "shall estimate and determine the damages for property taken, injured or destroyed." It is contended that a vacation does not take any property and does not injure or destroy property, and that therefore the jury has no warrant to assess damages for a vacation.

It is true, as already stated, that damages caused by the vacation of a street can not be recovered by reason of any provision in the new constitution. It is also true that the words "taken, injured or destroyed," found in the constitution, are the identical words used in the second section of the act of 1891. The context, however, is not the same in each case. Section 8, Article XVI, de-

clares: "Municpal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed." The taking of private property for public use is the subject matter for compensation. The same is true of Article I, Section 10: "Nor shall private property be taken or applied to public use without the authority of law and without just compensation."

The act of 1891 does not limit the compensation to the taking of private property for public use. Compensation under this act is to be made for damages sustained in making street improvements or in vacating public highways. In McGee's Appeal, 114 Pa., 477, it was held that the constitutional condition that compensation should be made did not apply to street vacations, because "by the vacation of Washington street no private property was taken or applied to public use." The court did not say that an owner's land was not "injured" by the vacating of a street. In fact, just the contrary was declared in the Vacation of Centre Street, 115 Pa., 253: "There is no difference in principle between cases of opening and those of vacating streets. Property fronting on a street may be either damaged or benefited by the one as well as the other; that is to say, while one piece of property may be injured another may be specially benefited even to a greater extent." So in the McGee case the court said: "We are of opinion, therefore, that the vacation of Washington street and the appropriation of the ground by the railroad company, the owners of the abutting property would not, in the absence of any special legislative provision for damages in such case, be subject to the constitutional condition that compensation shall be first made for property taken, injured or destroyed. If, as in the Centre street vacation, there had been a special provision for the award of damages to the owners of property injured by the vacation, a different question would be presented." We may add that if the constitution had declared "nor shall private property be taken for public use nor streets vacated without just compensation," a different question would be presented. Inasmuch as we have a special provision for the award of damages caused by the vacation of streets, in the act of 1891, it is useless to cite McGee's Appeal as an authority against the allowance of damages for a street vacation under the act of 1891.

That the words "taken, injured or destroyed" do not exclude

the assessment of damages for a vacation is manifest when we read the several sections of the act of 1891. If we give them the limited scope that counsel for the borough attaches to them, then the provisions of the several sections of the act contradict each other. First, the act declares compensation for the damages caused by vacation, if not agreed upon, shall be assessed by a jury; but when the jury hears the case the same section of the act declares (if counsel is correct) you can not assess any damages for a vacation, because no land was taken. So, in the third section of the act, damages sustained by vacation shall be paid when assessed; but if counsel is correct in his theory, they can not be assessed, for the jury has no right to find damages where there is no taking of land.

A construction or interpretation that leads to such an absurdity can not stand where a reasonable meaning can be given to the words —a construction which, without violence to the words, gives effect to every part of the statute. The same conclusion was reached in Howell vs. Morrisville, 29 C. C. R., 1.

It is also argued that if owners not abutting on the part of the street vacated are entitled to damages, the door is opened to speculative damages, and the act can not be applied because of the hardships and complications that will arise. We answer that the same objection could be made to the special act of April 21, 1858, P. L. 386, applicable to Philadelphia; and yet this act has been in force for nearly fifty years. The difficulties now suggested were considered in Melon Street, and the court held they did not constitute a valid objection.

And now, October 10, 1904, a jury will be appointed as prayed for.

Court of Quarter Sessions of Montgomery County.

In re Merit M. Missimer.

Where a justice of the peace views a dead body and decides that no inquest is necessary, he is not entitled to the compensation provided under the act of March 30, 1897, P. L. 8.

Application for compensation and rule to show cause why an allowance should not be made.

J. P. Hale Jenkins, Esq., for County Commissioners.

A. H. Hendricks, Esq., for Merit M. Missimer.

Opinion of the court by Swartz, P. J., September 19, 1904.

The justice viewed the dead body of Mayberry E. Willman, as also the bodies of Gottfried Goldschmidt and W. Howard Mason. He decided that no inquest was necessary, and so reported to the court. He claims compensation under the act of March 30, 1897, P. L. 8. He contends that he is entitled to the same compensation that is due the coroner where the latter views a dead body and reports that no inquest is necessary.

The act of May 27, 1841, P. L. 404, declares that "in all cases where, by law, the coroner of any county is required to hold an inquest over a dead body, it shall be lawful for a justice of the peace of the proper county to hold the same where there is no lawfully appointed coroner or he is absent from the county unable to attend, or his office is held more than ten miles distant from the place where the death occurred." This act further provides that no fee shall be allowed unless the court adjudges that there was reasonable cause for holding the inquest.

The justice's right to hold an inquest over a dead body is purely statutory. The office of justice of the peace carries with it no such powers. Prior to the act of May 27, 1841, he had no authority to hold an inquest over a dead body: Ex parte Schultz, 6 Whar., 269.

The act of March 30, 1897, under which the claim is made, does not name any one other than the coroner to make an inspection. The act provides for compensation to the coroner where he is called, views a dead body, and certifies that no inquest is necessary. This act covers cases where no inquest is necessary, while the act of 1841

limits the services of the justice and his compensation to cases where an inquest is necessary. The act of 1841 does not invest a justice of the peace with all the functions of a coroner. The justice does not become a coroner, but in certain specified cases performs the same duties that are required of the coroner. How then can it be said that the giving of additional powers to the coroner confers like powers upon a justice of the peace? The act of 1841 gives him compensation where he holds an inquest, and for his services at such inquest. But where is the statutory authority for claiming fees when no inquest is held?

For the same reason it was ruled that a deputy coroner duly appointed is not entitled to compensation where no inquest is held Fayette County Deputy Coroner's Case, 20 Penna. C. C. R., 641.

In the absence of any statute conferring on the justice the authority given to the coroner under the act of 1897, and in the absence of any authority for compensation except where an inquest is held, the application is refused and the rule entered in each case is discharged.

Court of Common Pleas of Montgomery County.

IN EQUITY.

DANIEL J. HOY VS. BERNARD DEMBOWSKI.

Where a public street or highway is called for as a boundary or monument in a deed, it is used as an entirety to the centre of it, and to that extent the fee passes even although it is described as to the side of the street: Paul vs. Carver, 26 Pa., 223.

If in a conveyance or mortgage of a lot it is described as bounded on a street laid down upon a municipal plan but unopened, the street becomes appurtenant to the lot, and as between the grantor and grantee, the mortgagor and mortgagee, title to the soil to the middle of the street passes: Patterson vs. Harlan, 124 Pa., 67.

The principle is the same whether the grantee's title be called an easement or a fee.

MOTION for a preliminary injunction. No. 1, October T., 1904.

Henry Freedley and *Jacob V. Gotwalts, Esqs.*, for plaintiff.

Henry M. Tracy, Esq., fer defendant.

Opinion of the court by WEAND, J., October 28, 1904.

Hoy vs. Dembowski.

First avenue and Maple street were laid out as streets of the borough of Conshohocken by the commissioners appointed under the act of May 15, 1850, P. L. 1051, and placed upon the borough plan recorded. Under the supplemental act of March 22, 1870, P. L. 522, a method was provided for opening streets laid out by the commissioners, as increasing improvements required.

Prior to 1887 John Wood was the owner of a tract of land in said borough, through which Maple street and First avenue had been laid out by the commissioners. By deed dated August 6, 1887, and recorded at Norristown in Deed Book No. 335, page 411, he conveyed in fee to Daniel J. Hoy, the plaintiff, two certain lots situate at the north corner of Maple street and First avenue. The deed describes the lots as extending along the sides of said streets.

At that time Maple street had been duly opened by regular proceedings; but First avenue was not then, and has not since been, declared opened according to the act of 1870.

On August 31, 1903, the executors of John Wood conveyed to the defendant, Bernard Dembowski, the balance of the said tract of land of which the plaintiff's lots were formerly a part, including the land under First avenue.

The defendant's title runs along and in front of plaintiff's land on Front or First avenue.

Some three months since plaintiff began erecting buildings on his land fronting on Front or First avenue, whereupon the defendant, claiming that plaintiff's title to the unopened street extended only to the side thereof, erected a fence, obstructing said avenue, which prevented plaintiff from using the street. Plaintiff removed the fence and defendant reërected it, with the result that plaintiff is stopped in his building; whereupon this bill was filed to restrain the defendant from obstructing the street.

Two questions are presented under these facts: First, Has the plaintiff by virtue of his conveyance an easement in Front or First avenue? and second, Has equity jurisdiction?

It is conceded that if Front or First avenue was duly opened, defendant's action was wrong.

In Paul vs. Carver, 26 Pa., 223, it was ruled that "where a public street or highway is called for as a boundary or monument in a deed, it is used as an entirety to the centre of it, and to that extent the fee passes." In the opinion the court, C. J. Lewis, said, "but it

is thought by the plaintiff in error that where the deed calls for a particular *side* of a street the case is taken out of the rule. In our opinion this is a circumstance entirely too insignificant to produce a result so inconvenient and so contrary to the practice of the people." This case has been so often affirmed that no further discussion is necessary. Has the principle been applied to a street laid out by commissioners but not yet opened?

In Huling vs. Henderson, 161 Pa., 553, the plaintiff bought his land by metes and bounds referable to a town plot calling for a street. There was no evidence that the town authorities accepted the street as a highway; and it was held that plaintiff had sufficient property right in the trees on the sidewalk to sustain an action against a stranger for the wanton destruction of the trees. The court said, "*Prima facie*, his title extended to the middle of the street," etc.

In Patterson vs. Harlan, 124 Pa., 67, it was ruled: "If in a conveyance or mortgage of a lot it is described as bounded on a street laid down upon a municipal plan but unopened, the street becomes appurtenant to the lot, and as between the grantor and grantee, the mortgagor and mortgagee, title to the soil to the middle of the street passes; otherwise we would have the anomaly of a man selling lots fronting upon certain streets, and then denying his grantee access to his land by closing up the streets and repudiating his own grant." This court has ruled the question In re Hamilton Street, 6 Montg., 207, and In re Lafayette Street, 7 Montg., 59.

As late as Cole vs. Philadelphia, 199 Pa., 464, it was ruled that "where a deed describes land as bounded by a street which at the time is plotted but unopened, the grantee takes title in fee to the land as bounded by the street, and an easement only over the bed of the unopened street. The title to the bed of the street remains in the original holder." The principle is the same, whether the grantee's title be called an easement or a fee.

The report of the commissioners laid out the streets mentioned in their report; and John Wood, in his deed to plaintiff, expressly recognized such streets as existing. It needed no further plan; and he sold to plaintiff "town lots."

Whether, therefore, plaintiff is the owner in fee to the centre of the street, or has only an easement, his right to have the street immediately in front of his lots unobstructed is clear. Monbeck vs.

Jones, 190 Pa., 171, and Wicksham vs. Twaddell, 25 Pa. Superior Ct., 188, establish plaintiff's right to maintain his bill.

And now, October 28, 1904, a preliminary injunction is hereby granted restraining said defendant, his workmen or employees, until final hearing, from obstructing First street or Front avenue, Conshohocken, or in any wise hindering said plaintiff from the lawful use of the same as a way or passage to and in connection with his said lots, plaintiff to first enter security in one hundred dollars.

Orphans Court of Montgomery County.

Estate of John C. Dunnett, Deceased.

The will of testator provided that the income of his estate should be paid to his wife during her life; at her death, to his son during his life; at his death, the principal of the estate to the son's issue, if any; if none, then the income was to be paid to the son's wife during life. Upon the death of the widow, son and his wife, and in default of issue of the son, the principal was bequeathed to nephews and a niece by name. One of the nephews and the niece died after the testator. In the distribution of estate, *held*, that the interests of the beneficiaries in remainder were vested.

E. L. Hallman, Esq., for the accountant, and as one of the distributees.

John Faber Miller, Esq., for George T. Dunnett, one of the distributees.

Opinion of the court by Solly, P. J., November 23, 1904.

John C. Dunnett, a resident of the township of Upper Dublin, this county, died therein on the 17th day of October, A. D. 1875, testate, and leaving surviving him his widow, Rachel, and issue one son, Edward, who was of full age. His will is dated August 24, 1875. The testator directed the sale of his real estate in Philadelphia if it should be unsold at his death; and the surplus of the proceeds, after the payment of encumbrances thereon, he bequeathed to his wife absolutely. He also bequeathed to her all his personal property and the income or use of his real estate in the township of Upper Dublin, with the provision that should she so desire the executors should sell the same and invest the money and pay the in-

come to her semi-annually during her natural life. The testator also provided as follows:

"Fourth. At the death of my wife Rachel my executors are still to keep the money invested (or sell the real estate and invest the money as above directed, as the case may be) and pay the interest arising therefrom to my son Edward during his natural life. Should my son Edward die before his wife Rebecca, then the interest is to be paid to her during her natural life if she so long remains his widow. But in case of my son Edward leaving lawful issue at his death, then the money invested by my executors shall be paid to the child or children or their proper guardians, and the interest cease to his widow.

"Fifth. If my son Edward die without issue, and after the death of my wife Rachel, and the death of my son Edward's wife Rebecca, the money heretofore mentioned and invested by my executors for their benefit shall be equally divided as follows: To my nephew, David Dunnett, one-fourth part; to my nephew, George Dunnett, one-fourth part—sons of my brother Benjamin; to my nephew, George Dunnett, one-fourth part, son of my brother George; and one-fourth part to my niece, Elizabeth Cummings, daughter of David Cummings, deceased."

The testator's widow died about the year 1877 and the son Edward about the same year. His widow survived him, but no issue. Rebecca, widow of the son Edward, died July 12, 1904, having never remarried.

The three nephews and the niece, beneficiaries in remainder, were living at the date of the death of the testator. The nephew, George, son of the testator's brother, Benjamin, is deceased, leaving issue four children. Elizabeth Cummings, the niece, is also dead, she having died October 28, 1875, when quite young. The other nephews are still living.

The distribution of the fund involves an interpretation of the will and the determination of the question whether the bequests to the nephews and niece are vested or contingent. Two of the nephews, David and George Dunnett, are living, and there is no doubt about their right to shares of the balance of the estate. George Dunnett, another nephew, son of testator's brother, Benjamin, died after the testator and his son Edward, leaving issue four children, who are

living. Elizabeth Cummings, the niece, also died after the testator, aged about six years, leaving her father and mother surviving.

The testator undoubtedly disposed of his entire estate. There is nothing in the language of the will to indicate that he intended to die intestate as to any portion of it. He first provided for his wife during life, then for his son during life, and then for his widow, if she survived him, and they had no issue living. When all were dead the principal of the estate was to be divided into four parts and paid to the three nephews and the niece, whom he named. He gave the use or income of his real estate to his wife for life, or, if she so desired, and a sale should be made, the income of the proceeds, which he directed to be invested; at her death the income was to be paid to his son, Edward, while he lived; at his death the principal was to be paid to his issue. But in default of issue the income was to be paid to the son's wife during life, if she remained a widow. Upon the death of the testator's widow, his son (without issue) and his wife, the corpus goes to the nephews and the niece. There is no condition attached to the gift. It does not depend upon a contingency. There is no provision for the disposition of the share of one dying in the life-time of the testator, or during the lives of the several life beneficiaries. Manifestly, the nephews and the niece were the ultimate objects of the testator's bounty. The conclusion must be, therefore, that the interests of these legatees in remainder vested in them at the death of the testator. The payment and enjoyment of the estate was postponed until the life interests carved thereout had terminated. Even if there is a doubt (which I do not have) whether the interests are vested or contingent, the law declares them vested in that case: Letchworth's Appeal, 30 Pa., 175.

As a general rule, a legacy will be deemed vested or contingent, just as the time shall appear to be annexed to the gift or the payment of it. If futurity is annexed to the substance of the gift, vesting is suspended; but if it appears to relate to the time of payment only, the legacy vests instantly. The point which determines the vesting is not whether time is annexed to the gift, but whether it is annexed to the substance of the gift as a condition precedent: McClure's Appeal, 72 Pa., 14.

The fact that one of the nephews and the niece will not enjoy their shares of the estate, by reason of their decease, can not affect the question of vesting. The certainty or uncertainty of the actual

enjoyment of an estate is not the test in determining the question whether it be vested or not, because the character of the estate would then depend upon the form of the result and not the terms of its creation. An unpossessed estate is vested if it is certain to take effect in possession by enduring longer than the precedent estate: Manderson vs. Lukens, 23 Pa., 31.

In further support of our conclusion a number of cases could be cited, among them Linnard's Estate, 8 W. N. C., 536; Burd's Executors vs. Burd's Administrator, 40 Pa., 182; McGill's Appeal, 61 Pa., 46; Cartensen's Estate, 196 Pa., 625.

We are of the opinion that the time fixed by the testator for the enjoyment of the ulterior interests of his estate was not annexed to the gifts themselves, formed no part of the description of the legatees, and their interests were not contingent upon their surviving the widow of the testator, his son, and his wife. They vested at testator's death.

The fund will be divided into four parts. One of them will be awarded to David Dunnett, another to George Dunnett, and the remaining two parts to the respective personal representatives of George Dunnett and Elizabeth Cummings, deceased.

Estate of John McKernan, Deceased.

A minor can not exercise the office of executor. If letters testamentary are granted to him, the court will revoke them; but the decree of revocation will not prevent the grant of letters to him after he attains the age of twenty-one years, if he is otherwise qualified to execute the will.

Rule on John J. McKernan, one of the executors, to show cause why letters testamentary granted to him should not be revoked.

Henry I. Fox, Esq., for petitioner.

Evans, & Dettra, Esqs., for respondent.

Opinion of the court by Solly, P. J., December 1, 1904.

John McKernan died in the borough of Bridgeport on August 8, 1904, leaving a last will and testament, which was admitted to probate and letters testamentary granted to the Norristown Trust Company and John J. McKernan, a son, who are named as executors.

McKernan's Estate.

The widow of the decedent has presented a petition to the court alleging that John J. McKernan, her step-son, is in his minority, having been born May 13, 1884, and is incapacitated by reason thereof from acting as executor. She also avers that she will suffer loss if he continues in the office. A rule was granted on him to show cause why the letters testamentary should not be revoked, to which he answers he was born May 13, 1883, as he verily believes, and is therefore twenty-one years old.

The allegation that the petitioner will suffer damage and loss if the young man is permitted to remain as executor, is not sustained by any proof. In what manner and to what extent she will be injured is not shown. It is highly improbable that her interests will not be guarded and her rights fully protected, in view of the responsibility of the Trust Company, the coexecutor, and the care exercised by its officers in the management of trusts.

Two questions are raised by the pleadings. One (of fact), Is John J. McKernan under the age of twenty-one years? the other (of law), If in his minority, is he by reason thereof disqualified to act as executor? The evidence bearing on the age of the young man, as given by the witnesses, is somewhat conflicting. The mother of the young man is dead, so neither parent is here to tell when he was born. A maternal aunt, two maternal uncles, and an aunt by marriage, positively fix the date of his birth as May, 1884. One of them, Mary Keller, says the decedent and his first wife, her sister, were married October 13, 1881; their first child was still born in March, 1883, and that John was born in May, 1884, and christened a few weeks thereafter in St. Agatha's Roman Catholic Church, Philadelphia. She and her brother, Thomas Murphy, now deceased, were the sponsors. Annie Murphy, an aunt by marriage, her husband, James T. Murphy, and John J. Murphy, an uncle, also fix the same dates of the marriage, birth of the first child, and when John was born. Mrs. Murphy fixes the time of the first child's birth, because she had a child born about the same time, and John was born about fourteen months afterwards. She is unable to state when he was christened, but says, "In our church children are generally christened within a week or two weeks of their birth." John J. Murphy says he was ill with typhoid fever for five months in 1883, and when he recovered he was told of the birth of the first child. The next year John was born.

As against this positive evidence there were called Mrs. Kate Burke, a maternal aunt, her husband, and Charles McFadden; also John J. McKernan. Mrs. Burke can not recall the date of the marriage of her sister, and only knows the age of John from what she heard his father say. Strange to say, she does not know if she is thirty-eight or thirty-nine years old. She further testified that the decedent moved to Bridgeport in July, 1887. It seems, according to another witness, he entered at once into possession of a hotel. The records of the Court of Quarter Sessions show the license was transferred to him in July, 1888. Little reliance can be placed on such a treacherous memory, when a period of one year is of such vital importance in a case. Mrs. Burke's husband says that at the spring election of 1904 the decedent told him John would have a vote in the fall. Charles McFadden, the assessor of the Third ward of Bridgeport, testifies that he put John's name on the list of voters of that ward about May 18 or 20, 1904, at the request of his father, who made affidavit that he was twenty-one years old on May 13, 1904. The young man only knows his age from what his father told him. He thought he was born in May, 1883. After his father's death two policies of industrial insurance on the life of the boy, issued by the Metropolitan Life Insurance Company, upon which payments had been made by the father while he lived, and which had been in the fire-proof safe, were handed to him. One was issued May 4, 1885, and the age of the boy is therein stated as two years; the other was issued July 25, 1887, and his age is given in it as four years. This would indicate, of course, that he was born in 1883. But the father may have been mistaken as to his son's age; or the age as stated may have been his next birthday, as is the rule with some life insurance companies. Upon the testimony of the witnesses alone, we think the weight of it shows that John J. McKernan was born May 13, 1884.

But aside from the witnesses we have the most conclusive proof of his age by something which does not depend on human memory —the church record of his baptism. A copy of this appears in the depositions. It shows that he was born May 13, 1884, of John McKernan and Elizabeth Murphy, and baptized May 25, 1884, by Rev. P. W. Brennan, of St. Agatha's Church, Thirty-eighth and Spring Garden streets, Philadelphia, the sponsors being Thomas

and Mary Murphy. This completely corroborates the petitioner's witnesses, and we do not have the slightest hesitation in finding that John J. McKernan is in his minority. He honestly believes that he was born in 1883; his father so told him, and it was the natural thing that he should firmly believe him. No reflection should be cast on the integrity of the father or the son. There has been an unfortunate error, which this proceeding has corrected.

The fact of his majority being established, is he disqualified from acting as executor so long as he is under the age of twenty-one years? This is rather a novel question, and one which does not seem to have been squarely decided in this state. A patient research by counsel and the court has failed to disclose a reported case in Pennsylvania We are not, however, without authority in determining the matter. At common law infancy did not disqualify a person for the office of executor: 11 American and English Encyclopedia (2d ed.), 752. It is said, however, in 2 Redfield on Law of Wills, 60, that "infants may be named as executors, but can not generally act as such until they arrive at full age. But if there be executors named also, who are of full age, there will be no necessity of the appointment of an administrator with the will annexed, as the adults may act till the infant comes of age."

In England an infant may be appointed executor, however young he be; but if he be sole executor he is disqualified from exercising the office during his minority, and by statute administration *cum testamento annexo* must be granted to his guardian or to such other person as the court shall think fit until he shall have attained the age of twenty-one years. But if he is not sole executor the statute does not apply, for if there are several executors, and some of full age, they may execute the will: 1 Williams on Executors (9th ed.), 271. Where an infant is sole executor, letters of administration with the will annexed *durante minore ætate* are granted: Ibid, 577.

During his minority the execution of the will and the administration of the estate devolves on the administrator appointed. When he attains full age he is then entitled to the office of executor to which he was appointed, and letters testamentary must be issued to him if he demands them. The disqualification exists only while he is a minor. Although the question does not seem to have arisen in the case, Judge Hanna in the course of his opinion in Pepper's

Estate, 32 W. N. C., 322, said: "He [the testator] may appoint a minor sole executor or coexecutor with others; but, as is well settled, he can not act until he attains lawful age." This was founded, no doubt, upon the authority of the text-book writers, some of whom are quoted above.

The framers of the act of March 15, 1832, P. L. 135, 1 P. & L., 1468 pl. 78, evidently considered it settled law that a minor was disqualified to act as executor or administrator, and his right to the office was suspended during minority; but if there were coexecutors qualified to act, the letters testamentary issued to them, for they provided for the execution of the will and the administration of the estate in case all the executors or persons entitled to act as administrators were in their minority. The twenty-third section of the act reads: "Whenever all the executors named in any last will and testament, or all the persons entitled as kindred to the administration of any decedent's estate, shall happen to be under the age of twenty-one years, it shall be lawful for the register to grant administration as aforesaid to any other fit person or persons, subject, nevertheless, to be terminated at the instance of any of the said minors who shall have arrived at the full age of twenty one years."

The policy of the law is sound. A minor ought not to have the power to execute a will and to manage and administer an estate as executor. He ought not to be permitted in law to act as trustee for others when he can not act for himself. If he can not contract for himself, he ought not to be empowered to contract for and in behalf of others. The law guards his person and protects his estate by appointing a guardian for him to manage it. It would be an anomaly if he could be the executor of a will or the administrator of an estate in which he was a legatee or heir, and his legacy or distributive share paid by him to his guardian, who in law could alone receive it and give legal acquittance and discharge. Other reasons might be given. In our judgment the law permits a testator to appoint a minor an executor, but forbids him to exercise the office till he has reached lawful age.

And now, December 1, 1904, upon due consideration, it is ordered, adjudged and decreed that the letters testamentary on the estate of John McKernan, deceased, granted to John J. McKernan, one of the executors, be and the same are hereby revoked. This decree, however, shall not operate to prevent the grant of letters

testamentary to him after he attains the age of twenty-one years, if he be then otherwise qualified to execute the will. A copy of this decree shall be certified by the clerk to the register of wills, to be filed in his office with the records of the estate. The costs of this proceeding are to be paid out of the estate.

Court of Common Pleas of Montgomery County.

EPHRAIM K. CROUTHAMEL VS. LEHIGH VALLEY TRACTION COMPANY.

Where the court is convinced that the jury has adopted a wrong basis for its estimate of damages, and has rendered a verdict which in the opinion of the court is excessive, a new trial should be granted.

MOTION for a new trial. No. 27, December T., 1903.

William F. Dannchower, Esq., for plaintiff.

Larzelere, Gibson & Eoq, Esqs., for defendant.

Opinion of the court by WEAND, J., October 3, 1904.

The wife was injured by reason of an accident caused by the negligence of the defendant company, and the suit is brought to recover the loss sustained by the wife—loss of earning power, and pain and suffering; and for the loss sustained by the husband—loss of his wife's services, companionship and society. The husband was the proprietor of a clothing factory, and his wife worked for him in the factory about four days in a week, for which she received one dollar per day. Up to the time of the accident the husband employed no one to take her place in the home. His mother-in-law, in consideration of her board, etc., performed household services. The wife claims to be permanently injured so as to render her unable to do her former work, and that her earning capacity is destroyed.

The jury rendered a verdict in favor of the husband for $3,000 and in favor of the wife for $6,000.

We distinctly told the jury that they could only compensate Mrs. Crouthamel for permanent loss of earning power as a wage-earner, separate from her duty as a housewife, on their finding that

her husband would permit her to seek employment for herself; and if he did so consent, and they so found, he could not also be compensated for her loss of services, for he had released her services to him when he allowed her to work for herself. Kidney trouble is claimed by the wife to be the result of her injuries. Her appearance would indicate that she is a remarkably healthy woman.

We must assume that the jury allowed her for pain and suffering and loss of earning power. If we divide the amount, we have $3,000 for loss of earning power; and as she worked only four days in a week and received one dollar per day, they have paid her for fifteen years and evidently capitalized the amount, which they were instructed not to do. It was a violent assumption to find that Mr. Crouthamel would for ten or fifteen years employ his wife in his factory and pay her wages; or that she would consent to give up her duty to her family and seek employment from other persons. But if we assume that the major part of the award was for pain and suffering, it seems too large. There is no fixed standard by which to measure pain; but $4,000 for kidney trouble, that had no greater effect than that described by Mrs. C., would seem to be too large. She claims that it is incurable. If she is mistaken, she has the whole amount; and yet the law intends that she shall only be paid whilst the disability or suffering exists.

The husband had released his wife from household duties; but after the accident was compelled to pay $2.50 per week for a servant, who was the same mother-in-law. If he should be obliged to do this for ten years, it would not be quite $2,000. But he claims also the loss of her society, aid and comfort. She was not an invalid to the extent that she was confined to her bed or the house, or that her mental faculties were impaired. It was simply the case of a woman who could not do certain kinds of labor that required strength. A factor in the case was the appearance of the woman. But we are afraid that the fact that the defendant is a corporation, and the recklessness of the motorman as described by the witnesses, had a too important effect upon the minds of the jury. If the award in favor of the wife is correct, then the husband's only claim could be for the loss of her society, etc. It appears to us that the awards are excessive.

And now, October 3, 1904, the motion for a new trial is over-

ruled upon condition that Mrs. Crouthamel within fifteen days from this date file a remittitur of $3,000 from the amount of the verdict in her favor; and that Ephraim K. Crouthamel within the same time file a remittitur of $1,000 from the verdict in his favor—otherwise a new trial is granted.

Wilson J. Smith vs. Leo Kaufman and Max Kaufman, as Partners.

Where parties enter into a building contract according to plans and specifications submitted, and the contractor is told to go ahead at once—the bond and contract to be subsequently executed—the contract is binding; and on failure of the builder to comply with his part of the agreement the contractor can recover the money expended for the labor and materials furnished in pursuance of the contract, together with the profits he would have made if the contract had been faithfully carried out.

Hearing before the court. No. 43, March T., 1904.

Evans & Dettra, Esqs., for plaintiff.

J. P. Hale Jenkins, Esq., for defendants.

Opinion of the court by Weand, J., December 5, 1904.

HISTORY OF THE CASE.

The suit is brought by plaintiff to recover damages alleged to have been sustained by reason of the failure of defendants to perform their part of a building contract.

The case was heard before the court by agreement without the intervention of a jury.

FINDINGS OF FACT.

1. Defendants proposed to build a factory at Duryea, Luzerne county, and employed McCormick & French, architects, to prepare plans and specifications and advertise for bids.

2. On the day fixed for the opening of the bids, which was done in the presence of the architects and defendants, it was ascertained that plaintiff was the lowest bidder. He was at once sent for and notified of the fact. His bid was $14,697. This took place on June 27, 1902.

3. Mr. Smith was told that the work should be his, that he should get the contract, and that the contract was awarded him and no delay was to be allowed in proceeding at once to work. He

was to go ahead at once. The contract and a bond of plaintiff to secure performance were to be afterwards sent to the defendants at New York.

4. Within a few days plaintiff sent an agreement signed by him, with a bond executed, to defendants' address in New York; and, receiving no reply, on July 9, 1902, telegraphed to defendants, "Have you executed contract, and when may I expect it?" But he received no reply.

5. Under date of July 25, 1902, the agreement and bond were returned to the architects by the New York attorneys of defendants with the statement that "Mr. Kaufman can not enter into any agreement in reference to the construction of buildings, and we return the papers to you."

6. At the meeting held June 27, 1902, nothing was said as to the conditions to be contained in the agreement. No fault was found by defendants with the agreement or bond.

7. Immediately after being awarded the contract plaintiff sublet parts of it, commenced to get out the mill work, ordered lumber, and up to the time when he received the letter from defendants' attorneys had expended $291.77. If the contract had been carried out the plaintiff would have realized a profit of $995.47.

8. We find as a fact that the contract was awarded plaintiff, that he was ordered to commence operations without waiting for the signing of the agreement or the execution of the bond, and that defendants broke their contract without cause, justification or excuse.

CONCLUSIONS OF LAW.

1. That plaintiff is entitled to recover a verdict.

2. That he is entitled to recover the money expended for labor and materials furnished in pursuance of the contract, together with the profits he would have made if the contract had been faithfully carried out.

ARGUMENT.

The contract was perfected on June 27, 1902, and by the earnest persuasion of defendants the plaintiff immediately commenced operations. The minds of both parties had agreed upon what was to be done and the price to be paid. The contract and bond were subsequent matters. The contract was to contain no condition other than the faithful performance of the contract by plaintiff; and he

was as effectually bound to do so without its being in writing. Except for facility of proof it had no virtue beyond plaintiff's verbal acceptance. It was connected with the plans and specifications on which the contract was awarded. Both parties knew what was required from the plans and specifications. See Maitland vs. Wilcox, 17 Pa., 231. For authority to recover profits see Imperial Coal Co. vs. Port Royal Coal Co., 138 Pa., 45; Sutherland on Damages, Vol. 2, Sec. 713, page 1622; Adams Express Co. vs. Egbert, 36 Pa., 360.

VERDICT.

And now, December 5, 1904, verdict in favor of the plaintiff for $1,287.24, with interest from July 25, 1902, to November 25, 1904, $180.25—total, $1,467.49. And unless exceptions are filed within the time required by law, after notice to defendants or their attorney, the prothonotary will enter judgment accordingly.

Township of Lower Merion vs. Levi S. Cline and Bryn Mawr Trust Company.

Under the act of April 28, 1899, P. L. 104, the township treasurer is liable under the bond required by the act for the entire amount of the tax duplicates received by him, less exonerations.

In this case the contention was that he was only liable for the amount of money actually coming into his hands.

Motion for judgment for want of a sufficient affidavit of defence. No. 70, October T., 1904.

Rowland Evans, Esq., for plaintiff.

William Righter Fisher and *H. M. Brownback, Esqs.*, for Bryn Mawr Trust Company.

Opinion of the court by Weand, J., December 5, 1904.

The township of Lower Merion is a township of the first class, under the provisions of the act of April 28, 1899, P. L. 104.

Levi S. Cline was elected treasurer of the township in the year 1900 for the term of three years, and served in the said office until the first Monday of March, 1903, when his term expired. At that time certain taxes, charged upon the tax duplicates, which had been

delivered to him as treasurer (as provided in said act) for the years 1900, 1901 and 1902, still remained uncollected.

The township auditors, in auditing and settling the accounts of said Cline, as treasurer, with the township, charged up against him all these balances of uncollected taxes after the allowance of certain abatements or exonerations and amounts paid out or to his successor in office by him, and found him, in their report, to be indebted to the township in $5,746.32.

The Bryn Mawr Trust Company was the surety on the bond given by Cline as treasurer.

An appeal from the report of the auditors was taken to this court, which, after argument and hearing, was dismissed in an opinion filed February 23, 1904, to No. 14, March T., 1904. Since that time the township has received on account of said balance $2,549.79, leaving still due a balance of $3,228.02, with interest from November 18, 1903,.for which amount this suit is brought on the bond of the treasurer.

There are no disputed facts. The sole question of law is, whether, under the bond required under the act aforesaid and given by defendants, the treasurer is liable, unless exonerated, for the entire amount of the tax duplicates or only for the amount actually coming into his hands.

When the appeal was before us the question of law was very ably argued by counsel, and we gave the case due consideration; and a reargument on this motion has not caused us to change our opinion. We therefore reaffirm our opinion rendered February 23, 1904, as of this motion and as part of this case.

And now, December 5, 1904, motion for judgment for want of a sufficient affidavit of defence sustained and rule for judgment made absolute.

Court of Common Pleas of Dauphin County.

WOLF VS. BROWN.

In a proceeding to recover possession of demised premises the jurisdiction of the justice must appear in every essential affirmatively on the face of the record or the proceeding is void.

Where the record failed to show that the lessor was peaceably possessed of the premises before the demise to the defendant, the duration of the term, that the term was fully ended, that the required three months notice given, that the authorized judgment was given, any proof to support the complaint, the location of the premises, and that the summons was served as directed by the act of 1901, the proceeding was set aside.

CERTIORARI.

F. B. Wickersham, Esq., for defendant.

Opinion of the court by KUNKEL, J., August 5, 1904.

It is not necessary to refer in detail to the exceptions filed to this record. It is sufficient to say that the proceeding before the justice purports to be brought under the act of December 14, 1863, to recover the possession of demised premises. In such a proceeding it is necessary that the jurisdiction of the justice shall appear affirmatively on the face of the record, or the proceeding is *coram non judice* and utterly void: Graver vs. Fehr, 89 Pa., 460. The jurisdiction is special, and the record of the justice must contain every essential to support his judgment: Given vs. Miller, 62 Pa., 133.

An examination of this record fails to show that the lessor was quietly and peaceably possessed of the premises before the demise to the defendants. It fails to show the duration of the term, or that the term was fully ended, or that three months previous notice was given of the lessor's desire to repossess the premises. These are matters of fact which the act of Assembly requires to be shown by due proof; and if they do not appear by the record to have been found by the justice, the proceeding is void: McDermott vs. McIlwain, 75 Pa., 341; Spotts vs. Farling, 2 Pearson, 295; McGinnis vs. Vernon, 67 Pa., 149; Given vs. Miller, *supra;* Bedford vs. Kelley, 61 Pa., 491.

There are other irregularities and defects which are fatal to the validity of this proceeding. The record does not show the judgment authorized by the act of Assembly, but a judgment for a sum of money and not stated to be for damages sustained. It does not show that any proof was offered to support the complaint. It does

not show the location of the premises sought to be recovered. It does not show that the summons was served in the manner prescribed by the act of July 9, 1901. It shows that the warrant of possession was issued without a judgment for the possession of the premises entered against the defendant. Indeed, it is difficult to conceive of a record defective in more particulars than that before us.

The judgment of the justice is reversed, and the proceeding is set aside.

Orphans Court of Philadelphia County.

MAGALDO'S ESTATE.

Where a bank account stands in the name of the decedent it raises a presumption that the decedent was the owner thereof; and in order to rebut such a presumption the proof must be clear and satisfactory.

Where a husband, who is also the administrator of his wife's estate, lays claim to certain funds deposited in a bank to her account but fails to recover the same, he is nevertheless entitled to commissions for administering her estate properly.

EXCEPTIONS to adjudication.

D. J. Callaghan, Esq., for accountant.

A. Atwood Grace, Esq., for minor children of decedent.

Opinion of the court by FERGUSON, J., January 30, 1904.

Letters of administration on this estate, which consisted wholly of a deposit in the Western Saving Fund, were granted to the husband of the decedent. He claimed that this money was his own and not his wife's. There is no doubt but that all the money held by either of them was earned by him. The wife had nothing when she married him, and neither acquired nor earned any afterwards. She attended to the household duties, and was so frugal and economical in their management that they saved money out of his limited earnings as a bootblack and lamp-lighter. He had an account of his own in a savings bank, and she had the one in question in another, but all the money that was deposited in it by her came from him. He had full knowledge of the fact that she had this account and that ic was in her own name, as he made some of the deposits therein for her himself.

Under these circumstances the presumption would be that this money which she received from him was a gift. Be this as it may, as the money was on deposit in her name, *prima facie* it was her property; and as she is now deceased, and the same is claimed by her husband, the burden is on him to overcome by positive proof this presumption: Qualter's Estate, 147 Pa., 124. This was attempted by calling as witnesses two of their children, who are now aged thirteen and fifteen years respectively, to testify to conversations between their parents, in which it is alleged that the mother admitted that this money belonged to their father. As these children testified to other facts which must have occurred when they were but infants, and as they are living with and under the domination of their father, and from other circumstances, the auditing judge concluded that their testimony was not entitled to any consideration. Whether another judge might have reached the same conclusion from the same evidence is immaterial. He saw and heard the witnesses, and is better qualified to judge than one who sees only the type-written testimony. As the proof to overcome the presumption of ownership in the wife in a case of this kind must be clear and satisfactory, the auditing judge rejected the claim. As we are not convinced of any error in his so doing, the first two exceptions are dismissed.

We see no reason, however, why the accountant should be deprived of his commissions. He has performed his duties as administrator and accounted for every dollar belonging to the estate. There is no allegation to the contrary. The fact that he was unsuccessful in establishing a claim against the estate, which he no doubt made in good faith, is no reason why he should not have the usual compensation for his services.

The third exception is sustained.

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COLLATERAL INHERITANCE TAX.

While lands situate in another state, and which a decedent domiciled in Pennsylvania died seized of, are not subject to collateral inheritance tax, yet if, under his will, there be an absolute necessity to sell the lands to carry out its provisions, an equitable conversion into personalty takes place, the proceeds come into this state for distribution and are liable to the tax. *Vanuxem's Estate*, 141.

COMMISSIONERS.

Where a husband, who is also the administrator of his wife's estate, lays claim to certain funds deposited in a bank to her account but fails to recover the same, he is nevertheless entitled to commissions for administering her estate properly. *Magaldo's Estate*, 218.

COMPETENCY OF WITNESS.

In the distribution of an assigned estate the wife of the assignor is a competent witness to prove her claim, the husband not contesting. *Sunderland's Estate*, 43.

CONTRACT.

Construction of contract as agent to sell machinery. *McClure vs. McMichael & Wildman Manufacturing Company*, 137.

A provision in the contract between a shipper and common carrier that notice of any claim for damages shall be given to the carrier is binding upon the shipper, and failure to give the notice will defeat a recovery in an action for negligence. *Alexander et al. vs. Philadelphia & Reading Railway Company*, 104.

Where parties enter into a building contract according to plans and specifications submitted, and the contractor is told to go ahead at once—the bond and contract to be subsequently executed—the contract is binding; and on failure of the builder to comply with his part of the agreement the contractor can recover the money expended for the labor and materials furnished in pursuance of the contract, together with the profits he would have made if the contract had been faithfully carried out. *Smith vs. Kaufman et al., partners*, 214.

CONTRACT FOR EMPLOYMENT.

R. entered into the employ of complainant, an ice company, as a driver and salesman; and in his agreement it was stated that he was not to sell any other goods while in its employment or its assigns, and that "when he shall leave the employment of complainants or their assigns he will immediately give to them a full and complete list of all the customers on the said routes with their residences at the time he leaves it; and that he will not thereafter for a space of five years sell, directly or indirectly, any ice, either on the aforesaid routes or any other routes of the party of the first part or their assigns, in the said county of Montgomery, within fifteen miles of Ogontz, but will use his influence and best endeavors to have the customers on said routes continue buying of the party of the first part or their assigns." R. left complainant's employment without notice and entered into the employment of another ice company, serving ice to about forty of complainant's customers within the prescribed limits and on the complainant's routes. *Held*, that an injunction was not against public policy; that the agreement was not unreasonable as to distance or time; and that the payment of wages was a sufficient consideration to support the agreement. *Shoemaker Ice Company vs. Rutherford et al.*, 159.

CORONER.

Justice of the peace as coroner. *In re Merit M. Missimer*, 200.

DAMAGES.

Plaintiff claimed compensation for damages to land committed since he obtained title. Evidence of acts committed prior to the inception of his title were not admissible. *McFadden et al, etc., vs. Philadelphia & Reading Railway Company*, 48.

DIVIDENDS.

Where part of a trust fund consists of shares of stock upon which script dividends are declared, convertible in stock or payable in cash at the option of the share-holder, such dividends are income as between life-tenant and remainderman. *Day's Estate*, 58.

New shares issued to stock-holders under a stock allotment, or the proceeds of the sale of the privilege to subscribe to such issue, are not profits or income belonging to the life-tenant, but become part of the corpus of the trust and belong to the remainderman. *Ib.*

DIVORCE.

The parties were residents of New York, were married in that state in 1893, and lived there for one year when respondent deserted his wife. For the last four years he has resided in Montgomery county, Pennsylvania. The libellant has always lived in New York. *Held*, the Montgomery county courts have no jurisdiction to decree divorce. *Bok vs. Bok*, 129.

Attachment to enforce decree. *Gilbert vs. Gilbert*, 133.

The act of April 15, 1845, P. L., 455, authorizes the court to enforce its decree in divorce by attachment; at the same time it was not the intent of the act to imprison where the respondent has no ability to comply with an order to pay money. *Ib.*

ELECTRIC LIGHT COMPANIES.

A borough ordinance imposed a tax on electric light poles, and subsequently entered into an agreement with the company to light the streets of the borough for a stipulated sum per night. A number of the poles were used exclusively for this purpose, and the company denied liability for tax on them. *Held*, that the tax could be collected. *West Conshohoken vs. Conshohocken Electric Light and Power Company*, 9.

EXECUTOR.

A minor can not exercise the office of executor. If letters testamentary are granted to him the court will revoke them; but the decree of revocation will not prevent the grant of letters to him after he attains the age of twenty-one years, if he is otherwise qualified to execute the will. *McKernan's Estate*, 207.

Where it appears that two of three executors of an estate are insolvent and heavily indebted to the estate; that they are also the partners composing an insolvent firm in process of liquidation; and that they neglect or refuse, after repeated demands by their co-executor, to put it in possession of the information necessary to enable it to take steps to protect the estate and enforce by action at law the rights of the estate against them and the firm, they will be removed from their office under the act of May 1, 1861. *Sharpless's Estate*, 88.

FEE TO HIGHWAY.

Where a public street or highway is called for as a boundary or monument in a deed, it is used as an entirety to the center of it, and to that extent the fee passes, even although it is described as to the side of the street. *Hoy vs. Dembowski*, 201.

The principle is the same whether the grantee's title be called an easement or a fee. *Ib.*

FIRE INSURANCE.

Removal of goods from one building to another. *Kolb vs. London Assurance Company*, 64.

FORECLOSURE OF MORTGAGE.

Where an administrator sells real estate and takes a mortgage for part of the purchase money, and the money represented by the mortgage is a trust fund, upon an application of the administrator for the appointment of a trustee to hold the fund, the mortgage passes to the appointed trustee and his successors in the trust without any formal transfer of the mortgage. Especially is this so where the administrator files an account showing that the mortgage is the clear balance of the trust fund in his hands. *Montgomery Insurance, Trust and Safe Deposit Company vs. Cary et al.*, 112.

FRAUDULENT CONVEYANCES.

A conveyance to a creditor subject to the payment of fixed liens on the real estate is not fraudulent, nor is it an assignment for the benefit of creditors where the grantor intends to part with all his interest. *Fitzpatrick vs. Hunter*, 152.

Where a fraudulent grantee gives back to the grantor all that was received by the conveyance, the first conveyance will not taint a second grant made to a new party when such second conveyance is without fraud in law or in fact. *Ib.*

JUSTICE OF THE PEACE.

In a proceeding to recover possession of demised premises the jurisdiction of the justice must appear in every essential affirmatively on the face of the record or the proceeding is void. *Wolf vs. Brown*, 218.

LEASE.

The lease of a hotel property between A. and B. contained a clause of amicable action of ejectment. A *habere facias possessionem* was issued to oust B, who then asked to have the judgment opened, alleging that he had an option of purchase. *Held*, that as the contract, as alleged, was in parol, B. could not in this manner enforce a contract for the sale of the land. *McGrath vs. Cahill*, 135.

LANDLORD AND TENANT.

Where the record failed to show that the lessor was peaceably possessed of the premises before the demise to the defendant, the duration of the term, that the term was fully ended, that the required three months notice given, that the the premises, and that was given, any proof to support the complaint, the location of authorized judgment the summons was served as directed by the act of 1901, the proceeding was set aside. *Wolf vs. Brown*, 218.

LIFE INSURANCE.

Right to change beneficiary named in the policy. *Security Company, Guardian, vs. Pacific Mutual Life Insurance Company of California*, 178.

MECHANIC'S LIEN.

The act of June 4, 1901, P. L. 431, does not require a mechanic's lien to contain, or have attached, a copy of the plans and specifications. *Hedden vs. Wainwright et al.*, 37.

Where the agreement provides that "in case of dispute respecting the true construction or meaning of the drawings or specifications, or as to what is extra work, outside of the contract, the same shall be decided by the architect, and his decision shall be final and conclusive," the sub-contractor can not recover for alleged extra work, when the architect decides against him as to what constitutes extra work. *Ib.*

Under the law as it stood prior to the act of June 4, 1901, P. L. 431, it was not necessary to annex the written contract to the mechanic's lien to support the lien. *Amberg, Jr., vs. Fitzpatrick*, 66.

It is competent to show by parol that under a new and distinct agreement, subsequent to the written contract, the work was to be performed in some particulars differing from the manner described in the original agreement. *Ib.*

MUNICIPAL CLAIM.

Assessment for cost of pipe. The assessment in this case was made according to the foot front rule, and the property being rural the charge was held to be illegal. *City of Philadelphia vs. Rorer et al.*, 71.

NEGLIGENCE.

One about to cross a railroad must seek a place to look where he can see, if that can be done; and if there be an obstruction to his view which is rapidly passing away, he should await its removal. *Kline vs. Philadelphia & Reading Railway Company*, 188.

Where the evidence of the plaintiff and his witnesses clearly shows one of two conditions, either of which convicts him of contributory negligence, a nonsuit is properly entered. *Ib.*

The promptness with which a car is stopped is convincing evidence of the speed of a moving car. *Horwits et al. vs. Schuylkill Valley Traction Company*, 29.

NEGLIGENCE—Continued.

A street passenger railway is not liable for an injury to a child where by a sudden and unexpected act the child runs against or directly in front of a moving car which could not be stopped in time to avoid the accident, although the car was running under proper control. *Ib.*

Where the plaintiff in a negligence case states that he knew the dangers of a wagon-way over a bridge, it is not error to leave to the jury the question whether the plaintiff as a foot-passenger was negligent in not taking the safe foot-way provided for travelers on the other side of the bridge, even where the court declares that it is negligence to test a known defect in a highway where a perfectly safe way is provided free from such defect along the same highway, which safe way is well known to the plaintiff. *Shaw vs. Borough of Conshohocken*, 174.

NEW TRIAL.

Where the court is convinced that the jury has adopted a wrong basis for its estimate of damages, and has rendered a verdict which in the opinion of the court is excessive, a new trial should be granted. *Crouthamel vs. Lehigh Valley Traction Company*, 212.

NON OBSTANTE VEREDICTO.

Where the verdict is for defendant and no question of law is reserved, there can be no judgment for plaintiff *non obstante verdicto*. *McFadden vs. Philadelphia & Reading Railway Company*, 48.

ORPHANS COURT.

Where the rights of other parties have not intervened the Orphans Court has power to revise its adjudication and correct an error in distribution; and this is so even after the decree of the court has been affirmed by an appellate court on matter upon which the distribution was based. *Godshalk's Estate*, 118.

PRODUCTION OF BOOKS AND PAPERS.

In a suit to foreclose a mortgage given by a corporation in the hands of a receiver a creditor will not be allowed an order to inspect the books of the company before hearing, where the purpose is not clearly stated so as to show petitioner's interest, the information desired, and the purpose. Where the only purpose is to deny the ownership of the bonds, for default of payment of the attached coupons a sale is asked, the opposing creditor can attain his object by a subpœna to produce the books at the hearing. *Thomas et al. vs. Lansdale and Norristown Electric Railway Company*, 106.

RAILROADS.

The petitioners asked for a jury to assess damages by reason of location of the site of bridge. *Held*, that they were entitled to a jury. *Selinger et al. vs. Philadelphia & Reading Railway Company*, 173.

Plaintiff shipped stoves over defendant's road from Montgomery county, Pennsylvania, to New Orleans, Louisiana. One of the conditions printed on the bill of lading provided: "No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or consignee." In a suit for damage to the stoves the first carrier in its affidavit of defense alleged that no accident or injury to the cars occurred prior to the time of delivery to the next connecting road; that the cars were then in good condition, having sustained no injury; and that if any injury did occur to the cars containing the stoves, such injury occurred on other roads. *Held*, to be sufficient to prevent judgment. *Royal Gas Stove and Foundry Company vs. Philadelphia & Reading Railway Company*, 128.

Under the act of March 17, 1869, P. L 12, the damages to be awarded for changing the site of a bridge or road are to he paid to the owner, or person interested at the time. A person who merely has the option of purchase, title not to be made until several years afterward, is not an owner or person interested within the meaning of the act. *Rickert vs. Philadelphia & Reading Railway Company*, 171.

Same subject, 172.

SCHOOL DISTRICT.

A school district is not liable for the cost of printing a list of delinquent taxpayers not ordered by them. *Hoover, Administratrix, vs. School District*, 53.

SERVICE.

In a suit against a minor son who lives with his father, a summons served by handing a copy to the father at his dwelling house, the son being absent from the state, is a proper service on the minor, under Section 1, clause (b), act of July 9, 1901, P. L. 614. *Yerkes et al. vs. Stetson, Jr.*, 101.

Service upon the vice-president and general manager of a corporation by leaving a true and attested copy of the writ at his dwelling-house with an adult member of his family, is in compliance with Section 2, clause (b) of the act of April 3, 1903. *O'Neill vs. Rapid Transit Company*, 24.

Under the act of March 10, 1810, service on the defendant may be made by leaving a copy of the summons at his dwelling-house in the presence of one or more of his family. Where the return of service fails to show that the copy was left at the dwelling-house the service is defective. *Kolb & Schwenk vs. Heist*, 23.

SET-OFF.

A holder of bonds secured by mortgage to a trustee, etc., can use the interest coupons due as an offset to a debt due by him to the mortgagor, notwithstanding the fact that the mortgage provides a remedy in case of default. *Pottstown Market Company vs. Stichler Lodge*, 42.

SHERIFF.

A sheriff can not be both seller and purchaser; and when he acts as his own auctioneer it is against public policy that he should bid on the property, either for himself or as the agent of another. *Trank vs. Gysling et al.*, 123.

SHERIFF'S SALE.

Distribution of proceeds of sale. *Jarrett vs. Walsh*, 147.

STAY OF EXECUTION.

Where a dispute has arisen within the meaning of the act of May 25, 1887, P. L. 270, and the defendant obtains an order on the plaintiff to issue a scire facias on her mortgage in this county, the court will not tolerate an evasion of the form and process pointed out by the law. ***Mynick vs. Bicking***, 115.

STREETS AND ALLEYS.

Norristown borough by ordinance vacated part of an alley. The Pennsylvania Railroad appropriated the alley for improvements to its new station and erected a high wall across the same at the terminus of its vacated part. The plaintiff owns real estate fronting on the part of the alley now vacated and asks an injunction to restrain the closing. *Held*, as all the work had been done before the application for preliminary injunction was applied for, it must be refused, as it is not the office of a preliminary injunction to undo what has already been completed. *Nocton vs. Pennsylvania Railroad Company et al*, 25.

STREETS AND ROADS.

A petition prayed for a jury to vacate and lay out a new road in place of the one vacated. The old road was fifty feet in width. The jury vacated the old road and laid out a new one on its bed forty feet in width, adopting the center line of the old road as the middle of the new. *Held*, that exceptions alleging that "the court had no power to narrow a public road, either directly or by means of the union of a variety of proceedings," should be dismissed. *In re Vacation of Road in Cheltenham Township*, 19.

A petition for the appointment of a road jury is not required to be verified by oath or affirmation. *In re Road in Lower Merion*, 164.

A petition to lay out a new road may also ask for the vacation of an old road if such should become necessary by reason of the old road thereby becoming useless, inconvenient and burdensome. *Ib.*

Where a borough vacates a street under the act of May 16, 1891, P. L. 75, an abutting owner is not damaged in his property, and under the law he has no tangible interest which gives him a right of complaint. ***Nocton vs. Pennsylvania Railroad Company***, 74.

STREETS AND ROADS—Continued.

The act of 1891 gives no appeal to the Court of Common Pleas where a municipality vacates a street. *Ib.*

The act of May 24, 1878, P. L. 129, providing for the assessment of damages in cases of the change of grade of streets, is not repealed by the act of May 16, 1891, and its supplement of June 12, 1893. *In re Borough of Collegeville*, 52.

Where part of a street has been vacated under the act of May 16, 1891, P. L. 75, owners of property which abuts upon the street but not upon the part vacated, are entitled to a jury to assess their damages. *Nocton vs. Borough of Norristown*, 194.

Where a street is vacated by ordinance of a borough council under the act of May 16, 1891. P. L. 75, upon petition of a majority of the owners of property abutting on the line of the improvement, an owner whose land does not abut on the part of the street vacated has no standing to appeal to the Court of Common Pleas to set aside the ordinance. *Nocton's Appeal*, 81.

STREET RAILWAY.

The franchise of a street railway passing through several localities is an entirety, and the necessary local or municipal consent for the whole route must be obtained before the company has a right to build any part of its road. *Township of Worcester vs. Souderton, Skippack and Fairview Electric Railway Company*, 97.

SUMMARY CONVICTION.

In summary conviction proceedings before a justice of the peace a writ of certiorari should be allowed by the court to make it effectual. *Commonwealth vs. Mitchell*, 49.

Where the proceedings are clearly irregular, an allowance *nunc pro tunc* will be entered. *Ib.*

Where the defendant is denied a hearing by himself and his witnesses, the conviction can not be sustained. *Ib.*

TAXES.

Under Sec. 2, act of June 4, 1901, P. L. 364, taxes become a lien on the land when they are assessed; and on a sale on execution during their lien are payable out of the proceeds of sale, although no claim therefor has been filed in the office of the prothonotary. *Trank vs. Gysling*, 123.

TAX COLLECTORS.

The treasurer of a township of the first class is the collector of taxes, and is bound to the same duties imposed by law upon the collector of taxes in other townships. *Bryn Mawr Trust Company Surety vs. Treasurer of Lower Merion Township*, 54.

When he receives the duplicate he becomes liable to account for the whole amount of the duplicate, subject to exonerations and allowances. *Ib.*

Until his accounts are settled by the township auditors, a suit upon his official bond is premature and unauthorized. *Ib.*

TAX ON POLES.

A borough ordinance imposed a tax on electric light poles, and subsequently entered into an agreement with the company to light the streets of the borough for a stipulated sum per night. A number of the poles were used exclusively for this purpose, and the company denied liability for tax on them. *Held*, that the tax could be collected. *West Conshohocken vs. Conshohocken Electric Light and Power Company*, 9.

TORTS.

In an action of tort against two or more, unless there is evidence of a joint tort by at least two of the defendants there can be no recovery against either. *Sturzebecker vs. Traction Company*, 46.

The rule that for a joint tort there can be no recovery upon proof of one or more separate torts, applies in a case where a husband and wife were sued as joint trespassers. *Hynes vs. Richl et al*, 126.

TOWNSHIP TREASURER.

Under the act of April 28, 1899, P. L. 104, the township treasurer is liable under the bond required by the act for the entire amount of the tax duplicates received by him, less exonerations.